



**PUBLIC EMPLOYEES'
OCCUPATIONAL SAFETY AND HEALTH
(PEOSH)**

**FIELD INSPECTION REFERENCE MANUAL
(FIRM)**

TABLE OF CONTENTS

CHAPTER I. PRE-INSPECTION PROCEDURES

A. GENERAL RESPONSIBILITIES AND ADMINISTRATIVE PROCEDURES

- 1. Assistant Director I-1
- 2. Chief. I-1
- 3. Assistant Chief. I-1
- 4. Compliance Safety and Health Officer. I-2
 - a. General. I-1
 - b. Subpoena Served on CSHO. I-2
 - c. Testifying in Hearings. I-2
 - d. Release of Inspection Information. I-2
 - e. Disposition of Inspection Records. I-2
- 5. General Area Office Responsibilities I-2

B. INSPECTION SCHEDULING

- 1. Program Planning. I-2
- 2. Inspection/Investigation Types I-3
 - a. Unprogrammed I-3
 - b. Unprogrammed Related I-3
 - c. Programmed I-3
 - d. Programmed Related I-3
- 3. Inspection Priorities. I-3
 - a. Order of Priority. I-3
 - b. Efficient Use of Resources. I-3
 - c. Follow-up Inspections. I-3
- 4. Inspection Selection Criteria I-3
 - a. General Requirements I-4
 - b. Employer Contacts. I-4

C. COMPLAINTS AND OTHER UNPROGRAMMED INSPECTIONS

- 1. General. I-4
- 2. Definitions. I-4
- 3. Identity of Complaint. I-5
- 4. Formalizing Oral Complaints. I-5
- 5. Imminent Danger Report Received by the Field.. I-5
- 6. Formal Complaints. I-5
- 7. Nonformal Complaints I-6
- 8. Results of Inspection to Complainant. I-6
- 9. Discrimination Complaints. I-7
- 10. Referrals. I-7
- 11. Accidents. I-7

D. PROGRAMMED INSPECTIONS. I-7

E. INSPECTION PREPARATION

- 1. General I-7
- 2. Planning. I-7
- 3. Advance Notice of Inspections. I-8
- 4. Expert Assistance. I-8

CHAPTER II. INSPECTIONS PROCEDURES

A. GENERAL INSPECTION PROCEDURES

- 1. Inspection Scope II-1
 - a. Comprehensive II-1

b. Partial.	II-1
2. Conduct of the Inspection	II-1
a. Time of Inspection	II-1
b. Presenting Credentials	II-1
c. Refusal to Permit Inspection.	II-2
(1) Refusal of Entry or Inspection.	II-2
(2) Employer Interference.	II-2
(3) Obtaining Compulsive Process	II-2
(4) Compulsive Process	II-2
(5) Action to be Taken Upon Receipt of Compulsive Process.	II-3
(7) Refused Entry or Interference with a Compulsive Process.	II-4
d. Forcible Interference with Conduct of Inspection or Other Official Duties	II-4
e. Release for Entry.	II-4
f. Strike or Labor Dispute.	II-4
g. Employee Participation.	II-5
3. Opening Conference.	II-5
a. Attendance at Opening Conference.	II-5
b. Scope.	II-5
c. Forms Completion	II-5
d. Employees of Other Employers	II-6
e. Voluntary Compliance Programs.	II-6
(1) Section 23g Consultations.	II-6
(2) Safety and Health Achievement Registration program (SHARP)	II-6
f. Walk-around Representatives	II-6
(1) Employees Represented by a Certified or Recognized Bargaining Agent	II-6
(2) Safety Committee	II-6
(3) No Certified or Recognized Bargaining Agent. . .	II-6
g. Disruptive Conduct	II-7
h. Examination of Record Programs and Posting Requirements.	II-7
(1) Records.	II-7
(2) Lost Workday Injury (LWDI) Rate.	II-7
(3) Posting.	II-8
4. Walkaround Inspection.	II-8
a. Evaluation	II-8
b. Record All Facts Pertinent to an Apparent Violation.	II-8
c. Collecting Samples	II-8
d. Taking Photographs and/or Videotapes.	II-8
e. Interviews.	II-8
(1) Purpose.	II-8
(2) Employee Right of Complaint.	II-9
(3) Time and Location.	II-9
(4) Privacy.	II-9
(5) Interview Statements	II-9
f. Employer Abatement Assistance.	II-9
(1) Policy	II-9
(2) Disclaimers	II-10
5. Closing Conference	II-10
B. SPECIAL INSPECTION PROCEDURES	
1. Follow-up and Monitoring Inspections.	II-10
a. Inspection Procedures	II-10
b. Failure to Abate	II-11
c. Reports	II-11
d. Follow-up Files	II-11

2. Fatality/Catastrophe Investigations.	II-11
a. Definitions	II-11
b. Selection of CSHO.	II-12
c. Families of Victims.	II-12
d. Rescue Operations.	II-12
e. Public Information Policy.	II-12
3. Imminent Danger Investigations	II-12
a. Definition	II-13
b. Requirements	II-13
c. Inspection	II-13
4. Construction Inspections.	II-14
a. Standards Applicability.	II-14
b. Definition.	II-14
c. Employer Worksite.	II-14

CHAPTER III INSPECTION DOCUMENTATION

A. FOUR STAGE CASE FILE DOCUMENTATION

1. General.	III-1
2. Case File Stages.	III-1

B. SPECIFIC FORMS

1. Narrative, Form OPEOSH-1A.	III-2
2. Photo Mounting Worksheet, Form OPEOSH-89	III-2
3. Inspection Case File Activity Diary Insert.	III-2

C. VIOLATIONS

1. Basis of Violations.	III-2
a. Standards and Regulations.	III-3
b. Employee Exposure.	III-3
2. Types of Violations.	III-4
a. Other-than-serious	III-4
b. Serious.	III-4
c. Violations of the General Duty Clause.	III-5
(1) Evaluation of Potential Section 6a-33 Situations	III-5
(2) Discussion of Section 5(a)(1) Elements	III-5
(3) Limitations on Use of the General Duty Clause.	III-7
(4) Pre-Citation Review.	III-8
d. Willful	III-8
e. Repeated	III-9
3. Health Standard Violations	III-11
a. Citation of Ventilation Standards.	III-11
b. Violations of the Noise Standard	III-12
c. Violations of the Respirator Standard.	III-13
d. Additive and Synergistic Effects	III-14
e. Absorption and Ingestion Hazards	III-14
f. Biological Monitoring.	III-14
4. Writing Citations.	III-14
5. Combining and Grouping of Violations	III-15
a. Combining.	III-15
b. Grouping	III-15
c. When Not to Group.	III-15
7. Employer/Employee Responsibilities	III-16

CHAPTER IV. POST-INSPECTION PROCEDURES

A. ABATEMENT

1. Period	IV-1
2. Reasonable Abatement Date	IV-1
3. Verification of Abatement	IV-1

4. Effect of Contest Upon Abatement Period.	IV-2
5. Long-Term Abatement Date for Implementation of Feasible Engineering Controls	IV-2
6. Feasible Administrative, Work Practice and Engineering Controls.	IV-2
a. Definitions.	IV-2
b. Responsibilities	IV-3
c. Reducing Employee Exposure	IV-3

B. CITATIONS

1. Issuing Citations.	IV-3
2. Amending or Withdrawing Citation and Notification of Penalty.	IV-4
a. Citation Revision Justified.	IV-4
b. Citation Revision Not Justified.	IV-4
c. Procedures for Amending or Withdrawing Citations	IV-4

C. PENALTIES

1. General Policy	IV-5
a. Statutory Authority.	IV-6
b. Penalty Factors.	IV-6
c. Gravity of Violation	IV-6
d. Severity Assessment.	IV-6
e. Probability Assessment	IV-6
f. Gravity-Based Penalty.	IV-7
g. Gravity Calculations for Combined or Grouped Violations.	IV-8
h. Penalty Adjustment Factors	IV-9
i. Effect on Penalties if Employer Immediately Corrects.	IV-10
j. Failure to Abate	IV-10
k. Repeated Violations.	IV-11
l. Willful Violations	IV-12
Violation of 29 CFR Parts 1903 and 1904	
m. Regulatory Requirements	IV-13

D. POST-CITATION PROCESSES

1. Informal Conferences	IV-16
a. General.	IV-16
b. Procedures	IV-16
c. Participation by OPEOSH Officials.	IV-17
d. Conduct of the Informal Conference	IV-17
e. Decisions.	IV-17
f. Failure to Abate	IV-17
2. Petitions for Modification of Abatement Date (PMA).	IV-18
a. Failure to Meet All Requirements	IV-18
c. Delayed Decisions.	IV-18
d. PEOSH Position on the PMA	IV-18
e. Employee Objections.	IV-19
3. Services Available to Employers.	IV-19
4. Settlement of Cases by Chiefs.	IV-19
a. General.	IV-19
b. Pre-Contest Settlement (Informal Settlement Agreement).	IV-20
c. Procedures for Preparing an Informal Settlement Agreement	IV-21
d. Post-Contest Settlement (Formal Settlement Agreement).	IV-21

5. Guidance for Determining Final Dates of Settlements and Review Commission Orders.	IV-22
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E. REVIEW COMMISSION

1. Transmittal of Notice of Contest and Other Documents to Review Commission	IV-22
a. Notice of Contest	IV-23
b. Documents to Executive Secretary	IV-23
c. Petitions for Modification of Abatement Dates (PMAs).	IV-24
2. Transmittal of File to Assigned Deputy Attorney General.	IV-23
a. Notification of the Assigned Deputy Attorney General	IV-24
b. Subpoena	IV-24
3. Communications with Commission Employees	IV-24
4. Dealings with Parties while Proceedings are Pending Before the Commission	IV-24

CHAPTER V – PENALTIES

I. General Penalty Policy.....	V-1
II. Civil Penalties.....	V-1
A. Statutory Authority.....	V-1
B. Appropriations Restrictions.....	V-2
C. Ceiling Penalties.....	V-2
Table 5-1: Ceiling Limits for Civil Penalties (Unadjusted).....	V-2
D. Minimum Penalties.....	V-2
E. Penalty Factors.....	V-3
F. Gravity of Violation.....	V-3
G. Severity Assessment.....	V-3
H. Probability Assessment.....	V-3
I. Gravity-Based Penalty.....	V-4
Table 5-2: Serious Violations.....	V-4
Table 5-3: Other-Than-Serious Violations.....	V-5
J. Gravity Calculations for Combined or Grouped Violations.....	V-5
K. Penalty Adjustment Factors.....	V-6
Table 5-4: Health & Safety Violations Penalty Adjustment Factors: Serious, Other-Than-Serious, and/or Repeated Violations.....	V-9
L. Effect on Penalties If Employer Immediately Corrects or Initiates Corrective Action.....	V-10
Table 5-5: Penalty Adjustment Factors Under the Immediate Abatement Program (Quick-Fix).....	V-11
Table 5-6: Penalty Adjustment Factors - Willful Violations.....	V-13
Table 5-7: Penalties to be Proposed for Willful Violations.....	V-13
O. Violations of 29 CFR Parts 1903 and 1904 Regulatory Requirements.....	V-14
Table 5-8: Penalty Overview - 29 CFR Part 1904 Recordkeeping Violations.....	V-15
Table 5-9: Penalty Overview - 29 CFR Part 1904 Injury And Illness Posting Violations.....	V-16
Table 5-10: Penalty Overview - 29 CFR Part 1904 Reporting And Access Violations.....	V-17
P. Failure to Provide Access to Medical and Exposure Records 29 CFR 1910.102.....	V-18
Q. Advanced Notice of Inspection.....	V-18
Table 5-11: Penalty Table.....	V-19
Directives Referenced in Chapter 5 – Penalties.....	V-20

Introduction/Disclaimer

This manual is intended to provide guidance regarding some of the internal operations of the Public Employees' Occupational Safety and Health (PEOSH), and is solely for the benefit of the Government. No duties, rights, or benefits, substantive or procedural, are created or implied by this manual. The contents of this manual are not enforceable by any person or entity against the Department of Labor or the State of New Jersey. Guidelines which reflect current Occupational Safety and Health Review Commission or court precedents do not necessarily indicate acquiescence with those precedents.

Chapter Title: Cover Memo

Field Inspection Reference Manual (FIRM)

The FIRM was developed to provide the field officers a reference document for identifying the responsibilities associated with the majority of their inspection duties.

This instruction applies PEOSH-wide.

PUBLIC EMPLOYEES' OCCUPATIONAL SAFETY and HEALTH (PEOSH) FIELD INSPECTION REFERENCE MANUAL (FIRM)

CHAPTER I

PRE-INSPECTION PROCEDURES

A. General Responsibilities and Administrative Procedures.

The following are brief descriptions of the general responsibilities for positions within PEOSH. Reference N.J.S.A. 34:6a – 25 et seq. for complete information on PEOSH mission and function statements. Employees should refer to their position descriptions for individual job responsibilities. This document empowers PEOSH personnel to make decisions as situations warrant with the ability to act efficiently to accomplish the mission of PEOSH and to enforce the New Jersey Public Employees Occupational Safety and Health Act.

1. Assistant Director / Service Director. It is the duty or mission of the Assistant Director to manage, execute and evaluate all programs of Public Employees Occupational Safety and Health (PEOSH) in the State of New Jersey. The Assistant Director reports to the Commissioner of Labor through the Assistant Commissioner.

2. Chief / Program Manager. It is the duty or mission of the Chief to accomplish PEOSH's programs within the area of responsibility of the Office. This includes administrative and technical support of the Compliance Safety and Health Officers (CSHOs) assigned to the Office, and the issuing of citations.

3. Assistant Chief / Project Coordinator. The Assistant Chief has first level supervisory responsibility over CSHOs in the discharge of their duties and may also conduct compliance inspections. Assistant Chiefs ensure technical adequacy in applying the policies and procedures in effect in the office. The Assistant Chief shall implement a quality assurance system suitable to the work group, including techniques such as random review of selected files, review based on CSHO recommendation/request, and verbal briefing by CSHOs and/or review of higher profile or non-routine cases.

4. Compliance Safety and / or Health Officer.

a. **General.** The primary responsibility of the Compliance Safety and / or Health Officer (CSHO) is to carry out the mandate given to the Commissioner of Labor, "to assure so far as possible every public employee (man and/or woman) in the State safe and healthful working conditions...." To accomplish this mandate Public Employees' Occupational Safety and Health employs a wide variety of programs and initiatives, one of which is enforcement of standards through the conduct of effective inspections to determine whether employers are:

(1) Furnishing places of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees, and

(2) Complying with safety and health standards and regulations.

Through inspections and other employee/employer contact, the CSHO can help ensure that hazards are identified and abated to protect workers. During these processes, the CSHO

must use professional judgment to adequately document hazards in the case file, as required by the policies and procedures in effect in the office. The CSHO will be responsible for the technical adequacy of each case file.

b. **Subpoena Served on CSHO.** If a CSHO is served with a subpoena, the Chief shall be informed immediately..

c. **Testifying in Hearings.** The CSHO is required to testify in hearings on PEOSH's behalf. The CSHO shall be mindful of this fact when recording observations during inspections. The case file shall reflect conditions observed in the workplace as accurately as possible. If the CSHO is called upon to testify, the case file will be invaluable as a means for recalling actual conditions.

d. **Release of Inspection Information.** The information obtained during inspections is confidential, but is to be determined as disclosable or nondisclosable on the basis of criteria established in the New Jersey Open Public Records Act or a superseding directive. Requests for release of inspection information shall be directed to the Chief.

e. **Disposition of Inspection Records.** "Inspection Records" are any records made by a CSHO that concern, relate to, or are part of any inspection or that concern, relate to, or are part of the performance of any official duty. Such original material and all copies shall be included in the case file. These records are the property of the State of New Jersey and a part of the case file. Inspection records are not the property of the CSHO and under no circumstances are they to be retained or used for any private purpose. Copies of documents, notes or other recorded information not necessary or pertinent, or not suitable for inclusion in the case file shall, with the concurrence and permission of the Chief, be destroyed in accordance with an approved record disposition schedule.

5. **General Area Office Responsibilities.** The Chief shall ensure that PEOSH maintains an outreach program appropriate to local conditions and the needs of the service area. The plan may include utilization of consultation, training and education services, referral services, voluntary compliance programs, abatement assistance, and technical services.

B. Inspection Scheduling.

1. **Program Planning.** Effective and efficient use of resources requires careful, flexible planning. In this way, the overall goal of hazard abatement and worker protection is best served.

2. Inspection/Investigation Types.

a. **Unprogrammed.** Inspections scheduled in response to alleged hazardous working conditions that have been identified at a specific worksite are unprogrammed. This type of inspection responds to reports of imminent dangers, fatalities/catastrophes, complaints and referrals. It also includes follow-up and monitoring inspections scheduled by PEOSH.

NOTE: This category includes all employers directly affected by the subject of the unprogrammed activity, and is especially applicable on multi-employer worksites.

b. **Unprogrammed Related.** Inspections of employers at multi-employer worksites whose operations are not directly affected by the subject of the conditions identified in the complaint, accident, or referral are unprogrammed related. An example would be a trenching inspection conducted at the unprogrammed worksite, where the trenching hazard was not identified in the complaint, accident report, or referral.

c. **Programmed.** Inspections of worksites which have been scheduled based upon objective or neutral selection criteria are programmed. The worksites are selected according to state wide scheduling plans for safety and for health or special emphasis programs.

d. **Programmed Related.** Inspections of employers at multi-employer worksites whose activities were not included in the programmed assignment, such as a low injury rate employer at a worksite where programmed inspections are being conducted for all high injury rate employers. All high hazard employers at the worksite shall normally be included in the programmed inspections.

3. Inspection Priorities.

a. **Order of Priority.** Generally, priority of accomplishment and assignment of staff resources for inspection categories shall be as follows:

Priority	Category
First	Imminent Danger
Second	Fatality/Catastrophe Investigations
Third	Complaints/Referrals Investigation
Fourth	Programmed Inspections

b. **Efficient Use of Resources.** Based on the nature of the alleged hazard, unprogrammed inspections normally shall be scheduled and conducted prior to programmed inspections. Deviations from this priority list are allowed so long as they are justifiable, lead to efficient use of resources, **and** contribute to the effective protection of workers. An example of such a deviation would be for the Chiefs to commit a certain percentage of IH resources to programmed Local Emphasis Program (LEP) inspections.

c. **Follow-up Inspections.** In cases where follow-up inspections are necessary, they shall be conducted as promptly as resources permit. Except in unusual circumstances, follow-up inspections shall take priority over all programmed inspections and any unprogrammed inspections with hazards evaluated as other than serious. Follow-up inspections should not normally be conducted within the 15 working day contest period unless high gravity serious violations were issued. See Chapter IV at A.4. regarding effect of contest upon abatement period.

4. Inspection Selection Criteria.

a. **General Requirements.** PEOSH's priority system for conducting inspections is designed to distribute available PEOSH resources as effectively as possible to ensure that maximum feasible protection is provided to the working men and women of this State.

(1) **Scheduling.** The Chief shall ensure that inspections are scheduled within the framework of this chapter, that they are consistent with the objectives of the PEOSH, and that appropriate documentation of scheduling practices is maintained

(2) **Effective Use of Resources.** The Chief shall ensure that PEOSH resources are effectively distributed during inspection activities. If an inspection is of a complex nature, the Chief may consider utilizing outside PEOSH resources (e.g., the Health Response Team) to more effectively employ the Office resources. The Office will retain control of the inspection.

(3) **Effect of Contest.** If an employer scheduled for inspection, either programmed or unprogrammed, has contested a citation and/or a penalty received as a result of a previous inspection and the case is still pending before the Review Commission, the following guidelines apply:

(a) If the employer has contested the penalty only, the inspection shall be scheduled as though there were no contest

(b) If the employer has contested the citation itself or any items thereon, then programmed and unprogrammed inspections shall be scheduled in accordance with the guidelines in B.3.a. of this chapter. The scope of unprogrammed inspections normally shall be partial. All items under contest shall be excluded from the inspection unless a potential imminent danger is involved.

b. **Employer Contacts.** Contacts for information initiated by employers or their representatives shall not trigger an inspection, nor shall such employer inquiries protect them against regular inspections conducted pursuant to guidelines established by the agency. Further, if an employer or its representative indicates that an imminent danger exists or that a fatality or catastrophe has occurred, the Chief shall act in accordance with established inspection priority procedures.

C. **Complaints & Other Unprogrammed Inspections.**

1. **General.** This section relates to information received and processed at the PEOSH office before an inspection rather than information which is given to the CSHO during an inspection. Complaints will be evaluated according to Office procedures, including using the criteria established in Chapter III, C.2. for classifying the alleged violations as serious or other. When essential information is not provided by the complainant, the complaint is too vague to evaluate, or the Office has other specific information that the complaint is not valid, an attempt shall be made to clarify or supplement available information. If a decision is made that the complaint is not valid, a letter will be sent to the complainant advising of the decision and its reasons.

C. 2. **Definitions.**

a. **Complaint (OSHA-7).** Notice of an alleged hazard (over which PEOSH has jurisdiction), or a violation of the Act, given by a present employee, a representative of employees, or a compliance officer seeking resolution of a discrimination complaint.

b. **Referral (OSHA-90).** Notice of an alleged hazard or a violation of the Act given by any source not listed under C.2.a., above, including media reports.

c. **Formal Complaint.** A signed complaint alleging an imminent danger or the existence of a violation threatening physical harm, submitted by a current employee, a representative of employees (such as unions, attorneys, elected representatives, and) or present employee of another employer if that employee is exposed to the hazards of the complained-about workplace.

d. **Nonformal Complaint.** Complaints by former employees.

3. **Identity of Complainant.** The identity of the complainant shall be kept confidential unless otherwise requested by the complainant. No information shall be given to employers which would allow them to identify the complainant.

4. **Formalizing Oral Complaints.**

a. If the complainant meets the criteria in C.2.c., above, for filing formal complaints and wishes to formalize an oral complaint, all pertinent information will be entered on an OSHA-7 form, or equivalent, by the complainant. A copy of this completed form can be sent to the complainant for signature, or the complainant shall be asked to sign a letter with the particular details of the complaint.

b. The complainant shall be informed that, if the signed complaint is not returned within 10 working days, it shall be treated as a nonformal complaint. If the signed complaint arrives after the 10 working days but prior to PEOSH's contact with the employer, it will be treated as a formal complaint.

c. The following are examples of deficiencies which would result in the failure of and apparent formal complaint to meet the requirements of the definition:

(1) A thorough evaluation of the complaint does not establish reasonable grounds to believe that the alleged violation can be classified as an imminent danger or that the alleged hazard is covered by a standard or, in the case of an alleged serious condition, by the general duty clause (N.J.A.C.34:6a-33a).

(2) The complaint concerns a workplace condition which has no direct relationship to safety or health and does not threaten physical harm; e.g., a violation of a regulation or a violation of a standard that is classified as de minimis.

(3) The complaint alleges a hazard which violates a standard but describes no actual workplace conditions and gives no particulars which would allow a proper evaluation of the hazard. In such a case the Chief shall make a reasonable attempt to obtain such information.

5. Imminent Danger Report Received By the Field. Any allegation of imminent danger received by PEOSH office staff shall be handled in accordance with the following procedures:

a. The Chief shall immediately determine whether there is a reasonable basis for the allegation.

b. Imminent danger investigations shall be scheduled with the highest priority.

c. When an immediate inspection cannot be made, the Chief or CSHO shall contact the employer (and when known, the employee representative) immediately, obtain as many pertinent details as possible concerning the situation and attempt to have any employees affected by imminent danger voluntarily removed. Such notification shall be considered advance notice and shall be handled in accordance with the procedures given in E.3. of this chapter.

6. Formal Complaints. All formal complaints shall be scheduled for workplace inspections.

a. **Determination.** Upon determination by the Assistant Chief that a complaint is formal, an inspection shall be scheduled in accordance with the priorities in B.3 A.

b. **Priorities for Responding by Inspections to Formal Complaints.** Inspections resulting from formal complaints shall be conducted according to the following priority:

(1) Formal complaints, other than imminent danger, shall be given a priority based upon the classification and the gravity of the alleged hazards as defined in Chapters III and IV.

(2) Formal serious complaints shall be investigated on a priority basis within 30 working days and formal other-than-serious complaints within 120 days.

(3) If resources do not permit investigations within the time frames given in (2), a letter to the complainant shall explain the delay and shall indicate when an investigation may occur. The complainant shall be asked to confirm the continuation of the alleged hazardous conditions.

(4) If a late complaint inspection is to be conducted, the Chief may contact the complainant to ensure that the alleged hazards are still existent.

7. Nonformal Complaints.

a. **Serious.** If a decision is made to handle a serious nonformal complaint by letter, a certified letter shall be sent to the employer advising the employer of the complaint items and the need to respond to PEOSH within a specified time. When applicable, the employer shall be informed of N.J.A.C. 110.7 requirements, and that the complainant will be kept informed of the complaint progress. Follow-up contact may be by telephone at the option of the PEOSH Office.

b. **Other-Than-Serious and De Minimis.** Nonformal complaints about other-than-serious hazards or de minimis conditions may be investigated by telephone if they can be satisfactorily resolved in that manner, with follow-up telephone contact to the complainant with the results of the employer's investigation and corrective actions. Corrective action shall be documented in the case file. If, however, the telephone contact is inadequate, a letter will be sent to the employer.

c. **Letter to Complainant.** Concurrent with the letter to the employer, a letter to the complainant shall be sent containing a copy of the letter to the employer. The complainant will be asked to notify PEOSH if no corrective action is taken within the indicated time frame, or if any adverse or discriminatory action or threats are made due to the complainant's safety and health activities. Copies of subsequent correspondence related to the complaint shall be sent to the complainant, if requested.

d. **Inspection of Nonformal Complaint.**

(1) Where the employer fails to respond or submits an inadequate response, the employer may be contacted to find out what corrections will be made, or the nonformal complaint will be activated for inspection. If no action has been taken, the nonformal complaint shall normally be activated for inspection.

(2) Nonformal complaints, when received, may be activated for inspection if the Chief or representative judges the hazard to be high gravity serious in nature, and the inspection can be performed with efficient use of resources.

8. **Results of Inspection to Complainant.** After an inspection, the complainant shall be sent a letter addressing each complaint item, with reference to the citations and/or with a sufficiently detailed description of the findings and why they did not result in a violation. The complainant shall also be informed of the appeal rights under N.J.S.A. 34:6A-45

9. **Discrimination Complaints.** N.J.A.C.110.7 The complainant shall be advised of the protection against discrimination afforded by the Act and shall be informed of the procedure for filing a complaint.

a. Safety and/or health complaints filed by former employees who allege that they were fired for exercising their rights under the Act are nonformal complaints and will not be scheduled for investigation.

(1) Such complaints shall be recorded on a Complaint Form. They shall be transmitted to the appropriate personnel for investigation of the alleged discrimination complaint.

(2) No letter shall be sent to the employer until after the discrimination officer has reviewed the case and decided that no recommendation for inspection will be submitted to the Chief.

(3) This screening process by the discrimination officer is not anticipated to take more than 3 work days and usually less. The Chief can expect to be informed by telephone of the decision within that time frame.

b. In those instances where the chief determines that the existence or nature of the alleged hazard is likely to be relevant to the resolution of the discrimination complaint, the complaint shall be sent back to the Chief for a PEOSH inspection to be handled as a referral.

c. When the decision is that no inspection is necessary, the Chief shall ensure that the complaint has been recorded on a OSHA-7 Form and proceed to send a letter to the employer in

accordance with procedures for responding to nonformal complaints.

d. Any discrimination complaint alleging an imminent danger shall be handled in accordance with the instructions in C.5.

10. **Referrals.** Referrals shall be handled in a same manner as to that of complaints.

11. **Accidents.** Accidents involving significant publicity or any other accident not involving a fatality or a catastrophe, however reported, may be considered as either a complaint or a referral, depending on the source of the report, and shall be handled according to the directions given in Chapter II.

D. Programmed Inspections.

1. Programmed inspections shall be scheduled in accordance with Chapter I. B.2.c of PEOSH FIRM.

2. Local emphasis programmed inspections shall be conducted in accordance with PEOSH chapter I. B.2.c.

E. Inspection Preparation.

1. **General.** The conduct of effective inspections requires professional judgment in the identification, evaluation and reporting of safety and health conditions and practices. Inspections may vary considerably in scope and detail, depending upon the circumstances in each case.

2. **Planning.** It is most important that the CSHO adequately prepares for an inspection. The CSHO shall also ensure the selection of appropriate inspection materials and equipment, including personal protective equipment, based on anticipated exposures and training received in relation to the uses and limitations of such equipment.

a. 29 CFR 1903.7c requires that the CSHO comply with all safety and health rules and practices at the establishment and wear or use the safety clothing or protective equipment required by PEOSH standards or by the employer for the protection of employees.

b. The CSHO shall not enter any area where special entrance restrictions apply until the required precautions have been taken. It shall be the Assistant Chief's responsibility to procure whatever materials and equipment are needed for the safe conduct of the inspection.

3. Advance Notice of Inspections.

a. **Policy.** New Jersey PEOSH Act and 29 CFR 1903.6 contain a general prohibition against the giving of advance notice of inspections, except as authorized by the Commissioner or the Commissioner's designee.

(1) The Occupational Safety and Health Act regulates many conditions which are subject to speedy alteration and disguise by employers. To forestall such changes in worksite conditions, New Jersey PEOSH Act prohibits unauthorized advance notice.

(2) There may be occasions when advance notice is necessary to conduct an effective investigation. These occasions are narrow exceptions to the statutory prohibition against advance notice.

(3) Advance notice of inspections may be given only with the authorization of the Chief and only in the following situations:

(a) In cases of apparent imminent danger to enable the employer to correct the danger as quickly as possible;

(b) When the inspection can most effectively be conducted after regular business hours or when special preparations are necessary;

(c) To ensure the presence of employer and employee representatives or other appropriate personnel who are needed to aid in the inspection; and

(d) When the giving of advance notice would enhance the probability of an effective and thorough inspection; e.g., in complex fatality investigations.

(4) Advance notice exists whenever the PEOSH Office sets up a specific date or time with the employer for the CSHO to begin an inspection. Any delays in the conduct of the inspection shall be kept to an absolute minimum. Lengthy or unreasonable delays shall be brought to the attention of the Assistant Chief. Advance notice generally does not include non-specific indications of potential future inspections.

(5) In unusual circumstances, the Chief may decide that a delay is necessary. In those cases the employer or the CSHO shall notify affected employee representatives, if any, of the delay and shall keep them informed of the status of the inspection.

b. **Documentation.** The conditions requiring advance notice and the procedures followed shall be documented in the case file.

4. Expert Assistance.

a. The Chief shall arrange for a specialist and/or specialized training, preferably from within PEOSH, to assist in an inspection or investigation when the need for such expertise is identified.

b. PEOSH specialists may accompany the CSHO or perform their tasks separately. A CSHO must accompany outside consultants. PEOSH specialists and outside consultants shall be briefed on the purpose of the inspection and personal protective equipment to be utilized.

PUBLIC EMPLOYEES' OCCUPATIONAL SAFETY and HEALTH (PEOSH) FIELD INSPECTION REFERENCE MANUAL (FIRM)

CHAPTER II

INSPECTION PROCEDURES

A. General Inspection Procedures.

1. **Inspection Scope.** Inspections, either programmed or unprogrammed, fall into one of two categories depending on the scope of the inspection:

a. **Comprehensive.** A substantially complete inspection of the potentially high hazard areas of the establishment. An inspection may be deemed comprehensive even though, as a result of the exercise of professional judgment, not all potentially hazardous conditions, operations and practices within those areas are inspected.

b. **Partial.** An inspection whose focus is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment. A partial inspection may be expanded based on information gathered by the CSHO during the inspection process. Consistent with the provisions of the Act, and PEOSH priorities, the CSHO shall use professional judgment to determine the necessity for expansion of the inspection scope, based on information gathered during records or program review and walk-around inspection.

2. Conduct of the Inspection.

a. **Time of Inspection.** Inspections shall be made during regular working hours of the establishment except when special circumstances indicate otherwise. The Assistant Chief and CSHO shall confer with regard to entry during other than normal working hours.

b. Presenting Credentials.

(1) At the beginning of the inspection the CSHO shall locate the public official in charge at the workplace and present credentials.

(2) When neither the person in charge nor a management official is present, contact may be made with the employer to request the presence of the management official. The inspection shall not be delayed unreasonably to await the arrival of the employer representative. This delay should normally not exceed one hour. If the person in charge at the workplace cannot be determined, record the extent of the inquiry in the case file and proceed with the physical inspection.

c. **Refusal to Permit Inspection.** The Act provides that CSHOs may enter without delay and at reasonable times any establishment covered under the Act for the purpose of conducting an inspection. Unless the circumstances constitute a recognized exception to the warrant requirement an employer has a right to require that the CSHO seek an inspection warrant prior to entering an establishment and may refuse entry without such a warrant.

(1) **Refusal of Entry or Inspection.** When the employer refuses to permit entry upon being presented proper credentials or allows entry but then refuses to permit or hinders the inspection in some way, a tactful attempt shall be made to obtain as much information as possible about the establishment. (See A.2.c.(4), below, for the information the CSHO shall attempt to obtain.)

(a) If the employer refuses to allow an inspection of the establishment to proceed, the CSHO shall leave the premises and immediately report the refusal to the Assistant Chief.

(b) If the employer raises no objection to inspection of certain portions of the workplace but objects to inspection of other portions, this shall be documented. Normally, the CSHO shall continue the inspection, confining it only to those certain portions to which the employer has raised no objections.

(c) In either case the CSHO shall advise the employer that the refusal will be reported to the Assistant Chief and that the agency may take further action, which may include obtaining legal process.

(d) On multi-employer worksites, valid consent can be granted by the owner, or another co-occupier of the space, for site entry.

(2) **Employer Interference.** Where entry has been allowed but the employer interferes with or limits any important aspect of the inspection, the CSHO shall determine whether or not to consider this action as a refusal. Examples of interference are refusals to permit the walk-around, the examination of records essential to the inspection, the taking of essential photographs and/or videotapes, the inspection of a particular part of the premises, indispensable employee interviews, or the refusal to allow attachment of sampling devices.

(3) **Obtaining Compulsory Process.** If it is determined, upon refusal entry or refusal to produce evidence required by subpoena, that a warrant will be sought, the Chief shall proceed according to guidelines and procedures established for warrant applications.

a Imminent Danger.

Description of alleged imminent danger situation.

Date received and source of information.

Original allegation and copy of typed report, including basis for reasonable expectation of death or serious physical harm and immediacy of danger.

Whether all current imminent danger processing procedures have been strictly followed.

b Fatality/Catastrophe.

The OSHA-36F filled out in as much detail as possible.

c Complaint or Referral.

Original complaint or referral and copy of typed complaint or referral.

Reasonable grounds for believing that a violation that threatens physical harm or imminent danger exists, including standards that could be violated if the complaint or referral is true and accurate.

Whether all current complaint or referral processing procedures have been strictly followed.

Additional information gathered pertaining to complaint or referral evaluation.

d. Programmed.

Targeted safety—general industry, maritime, construction.

Targeted health.

Special emphasis program—Special Programs, Local Emphasis Program, etc.

e. Follow-up.

Date of initial inspection.

Details and reasons follow-up was to be conducted.

Copies of previous citations on the basis of which the follow-up was initiated.

Copies of settlement stipulations and final orders, if appropriate.

Previous history of failure to correct, if any.

f. Monitoring.

Date of original inspection.

Details and reasons monitoring inspection was to be conducted.

Copies of previous citations and/or settlement agreements on the basis of which the monitoring inspection was initiated.

PMA request, if applicable.

(4) **Compulsory Process.** When a court order or warrant is obtained requiring an employer to allow an inspection, the CSHO is authorized to conduct the inspection in accordance with the provisions of the court order or warrant. All questions from the employer concerning reasonableness of any aspect of an inspection conducted pursuant to compulsory process shall be referred to the Chief.

(5) **Action to be Taken Upon Receipt of Compulsory Process.** The inspection will normally begin within 24 hours of receipt of a warrant or of the date authorized by the warrant for the initiation of the inspection.

(a) The CSHO shall serve a copy of the warrant on the employer and make a separate notation as to the time, place, name and job title of the individual served.

(b) The warrant may have a space for a return of service entry by the CSHO in which the exact dates of the inspection made pursuant to the warrant are to be entered. Upon completion of the inspection, the CSHO will complete the return of service on the original warrant, sign and forward it to the Assistant Chief for appropriate action.

(c) Even where the walk-around is limited by a warrant or an employer's consent to specific conditions or practices, a subpoena for production of records shall be normally served, if necessary, in accordance with A.2.c.(3), above. The records specified in the subpoena shall include (as appropriate) injury and illness records, exposure records, the written hazards communication program, the written lockout-tagout program, and records relevant to the employer's safety and health management program, such as safety and health manuals or minutes from safety meetings.

(d) The Assistant Director, or Chief authorized to do so, may issue, for each inspection, an administrative subpoena which seeks production of the above specified categories of documents. The subpoena may call for immediate production of the records with the exception of the documents relevant to the safety and health management program, for which a period of 5 working days normally shall be allowed.

(e) If circumstances make it appropriate, a second warrant may be sought based on the review of records or on "plain view" observations of other potential violations during a limited scope walk-around.

(6) Refused Entry or Interference with a Compulsory Process.

(a) When an apparent refusal to permit entry or inspection is encountered upon presenting the warrant, the CSHO shall specifically inquire whether the employer is refusing to comply with the warrant.

(b) If the employer refuses to comply or if consent is not clearly given, the CSHO shall not attempt to conduct the inspection but shall leave the premises and contact the Assistant Chief concerning further action. The CSHO shall make notations (including all witnesses to the refusal or interference) and fully report all relevant facts to the Assistant Chief.

d. Forcible Interference with Conduct of Inspection or Other Official Duties. Whenever an PEOSH official or employee encounters forcible resistance, opposition, interference, etc., or is assaulted or threatened with assault while engaged in the performance of official duties, all investigative activity shall cease.

(1) The Assistant Chief shall be advised by the most expeditious means.

(2) Upon receiving a report of such forcible interference, the Chief or designee shall immediately notify the Assistant Director.

e. Release for Entry.

(1) The CSHO shall not sign any form or release or agree to any waiver. This includes any employer forms concerned with trade secret information.

(2) The CSHO may obtain a pass or sign a visitor's register, or any other book or form used by the establishment to control the entry and movement of persons upon its premises. Such signature shall not constitute any form of a release or waiver of prosecution of liability under the Act.

f. Strike or Labor Dispute. Plants or establishments may be inspected regardless of the existence of labor disputes involving work stoppages, strikes or picketing. If the CSHO identifies an unanticipated labor dispute at a proposed inspection site, the Assistant Director shall be consulted before any contact is made.

(1) **Programmed Inspections.** Programmed inspections may be deferred during a strike or labor dispute, either between a recognized union and the employer or between two unions competing for bargaining rights in the establishment.

(2) **Unprogrammed Inspections.** Unprogrammed inspections (complaints, fatalities, etc.) will be performed during strikes or labor disputes. However, the seriousness and reliability of any complaint shall be thoroughly investigated by the supervisor prior to scheduling an inspection to ensure as far as possible that the complaint reflects a good faith belief that a true hazard exists. If there is a picket line at the establishment, the CSHO shall inform the appropriate union official of the reason for the inspection prior to initiating the inspection.

g. Employee Participation. The CSHO shall advise the employer that N.J.A.C. 34:6a-36b requires that an employee representative be given an opportunity to participate in the inspection.

- (1) CSHOs shall determine as soon as possible after arrival whether the employees at the worksite to be inspected are represented and, if so, shall ensure that employee representatives/complainants are afforded the opportunity to participate in all phases of the workplace inspection.
- (2) If an employer resists or interferes with participation by employee representatives/complainants in an inspection and this cannot be resolved by the CSHO, the continued resistance shall be construed as a refusal to permit the inspection and the Assistant Chief shall be contacted in accordance with A.2.c. of this chapter.

NOTE: For the purpose of this chapter, the term "employee representative" refers to (1) a representative of the certified or recognized bargaining agent, or, if none, (2) an employee member of a safety and health committee who has been chosen by the employees (employee committee members or employees at large) as their PEOSH representative, or (3) an individual employee who has been selected as the walk-around representative by the employees of the establishment.

A. 3. **Opening Conference.** The CSHO shall attempt to inform to all affected employers of the purpose of the inspection, provide a copy of the complaint if applicable, and shall include employees unless employer objects. The opening conference shall be kept as brief as possible and may be expedited through use of an opening conference handout. Conditions of the worksite shall be noted upon arrival as well as any changes which may occur during the opening conference. **In addition, should the employer, the complaining party or the employee representative request separate opening or closing conferences or both, written summaries of these conferences shall be provided by the Compliance Officer to all parties affected.**

a. **Attendance at Opening Conference.** PEOSH encourages employers and employees to meet together in the spirit of open communication. The CSHO shall conduct a joint opening conference with employer and employee representatives unless either party objects. If there is objection to a joint conference, the CSHO shall conduct separate conferences with employer and employee representatives.

b. **Scope.** The CSHO shall outline in general terms the scope of the inspection, including private employee interviews, physical inspection of the workplace and records, possible referrals, discrimination complaints, and the closing conference(s).

c. **Forms Completion.** The CSHO shall obtain available information for the OSHA-1 and other appropriate forms.

d. **Employees of Other Employers.** During the opening conference, the CSHO shall determine whether the employees of any other employers are working at the establishment. If these employers may be affected by the inspection, the scope may be expanded to include others or a referral made at the discretion of the CSHO. At multi-employer sites, copies of complaint(s), if applicable, shall be provided to all employers affected by the alleged hazard(s).

(1) **Section 23g Consultations.** In accordance with 29 CFR 1908.7 and Chapter IX of the Consultation Policies and Procedures Manual (CPPM), the CSHO shall ascertain at the opening conference whether an OSHA-funded consultation is in progress or whether the facility is pursuing or has received an inspection exemption through consultation under current procedures.

(a) An on site consultation visit in progress has priority over programmed inspections except as indicated in 29 CFR 1908.7(b)(2)(iv), which allows for critical inspections as determined by the Assistant Commissioner in consultation with the Deputy Commissioner.

(b) If a consultation visit is in progress, the inspection may be rescheduled.

(c) If a follow-up inspection (including monitoring) or an imminent danger, fatality/catastrophe, complaint or referral investigation is to be conducted, the inspection shall not be deferred, but its scope shall be limited to those areas required to complete the purpose of the investigation. The consultant must interrupt the onsite visit until the compliance inspection shall have been completed.

(2) **Safety and Health Achievement Registration Program (SHARP).** In the event a CSHO enters a facility that has been approved for participation in a SHARP and is currently under an inspection exemption, the approval letter shall be copied and the inspection either be terminated (if it is a programmed inspection) or limited to the specified items in the complaint or referral (if it is unprogrammed).

b. **Walk-around Representatives.** Those representatives designated to accompany the CSHO during the walk-around are considered walk-around representatives, and will generally include employer designated and employee designated representatives. At establishments where more than one employer is present or in situations where groups of employees have different representatives, it is acceptable to have a different employer/employee representative for different phase of the inspection. More than one employer and/or employee representative may accompany the CSHO throughout or during any phase of an inspection if the CSHO determines that such additional representatives will aid, and not interfere with, the inspection (29 CFR 1903.8(a)).

(1) **Employees Represented by a Certified or Recognized Bargaining Agent.** During the opening conference, the highest ranking union official or union employee representative on-site shall designate who will participate in the walk-around. PEOSH regulation 29 CFR 1903.8(b) gives the CSHO the authority to resolve all disputes as to who is the representative authorized by the employer and employees. Title 29 CFR 1903.8© states that the representative authorized by the employees shall be an employee of the employer. The CSHO can decide to include others.

(2) **Health and Safety Committee.** The employee members of an established facility safety committee or the employees at large may have designated an employee representative for PEOSH inspection purposes or agreed to accept as their representative the employee designated by the committee to accompany the CSHO during an PEOSH inspection.

(3) **No Certified or Recognized Bargaining Agent.** Where employees are not represented by an authorized representative, where there is no established safety committee, or where employees have not chosen or agreed to an employee representative for PEOSH inspection purposes whether or not there is a safety committee, the CSHO shall determine if any other employees would suitably represent the interests of employees on the walk-around. If selection of such an employee is impractical, the CSHO shall consult with a reasonable number of employees during the walk-around.

(2) **Disruptive Conduct.** The CSHO may deny the right of accompaniment to any person whose conduct interferes with a full and orderly inspection (29 CFR 1903.8(d)). If disruption or interference occurs, the CSHO shall use professional judgment as to whether to suspend the walk-around or take other action. The Assistant Director shall be consulted if the walk-around is suspended. The employee representative shall be advised that during the inspection matters unrelated to the inspection shall not be discussed with employees.

k. Examination of Record Programs and Posting Requirements.

(1) **Records.** As appropriate, the CSHO shall review the injury and illness records to the extent necessary to determine compliance and identify trends. Other PEOSH programs and records will be reviewed at the CSHO's professional discretion as necessary.

(2) **Lost Workday Injury (LWDI) Rate.** The LWDI may in the CSHO's discretion be used in determining trends in injuries and illnesses. The LWDI rate is calculated according to the following formula: If the number of employees hours worked is available from the employer, use:

$$\text{LWDI Rate} = \frac{\# \text{ LWDI's} \times 200,000}{\# \text{ employee hours worked}}$$

Where:

LWDI's = sum of LWDI's in the reference years.

employee hours worked = sum of employee hours in the reference years.

200,000 = base for 100 full-time workers, working 40 hours per week, 50 weeks per year.

EXAMPLE: An establishment scheduled for inspection in October 2003 employed an average of 54 workers in 2002, 50 workers in 2001, and 50 workers in 2000. Therefore, injury and employment data for the two preceding calendar years will be used.

LWDI's in 2001 = 5

LWDI's in 2002 = 3

Employee hours worked in 2001 = 100,000

Employee hours worked in 2002 = 108,000

$$\text{LWDI Rate} = \frac{(5 + 3) \times 200,000}{100,000 + 108,000}$$

$$= \frac{1,600,000}{208,000}$$

$$= 7.69 \text{ (rounded to 7.7)}$$

(3) **Posting.** The CSHO shall determine if posting requirements are met in accordance with 29 CFR Parts 1903 and 1904.

(4). **Walk-around Inspection.** The main purpose of the walk-around inspection is to identify potential safety and/or health hazards in the workplace. The CSHO shall conduct the inspection in such a manner as to eliminate unnecessary personal exposure to hazards and to minimize unavoidable personal exposure to the extent possible.

a. **Evaluation.** The employer's safety and health program shall be evaluated to determine the employer's good faith. See Chapter IV, C.2.i.(5)(b).

b. **Record All Facts Pertinent to an Apparent Violation.**

Apparent violations shall be brought to the attention of employer and employee representatives at the time they are documented. CSHOs shall record at a minimum the identity of the exposed employee, the hazard to which the employee was exposed, the employee's proximity to the hazard, the employer's knowledge of the condition, and the manner in which important measures were obtained.

NOTE: If employee exposure (either to safety or health hazards) is not observed, the CSHO shall document facts on which the determination is made that an employee has been or could be exposed.

c. **Collecting Samples.**

(1) The CSHO shall determine as soon as possible after the start of the inspection whether sampling, such as but not limited to air sampling and surface sampling, is required by utilizing the information collected during the walk-around and from the pre-inspection review.

(2) If either the employer or the employee representative requests sampling results, summaries of the results shall be provided to the requesting representative as soon as practicable.

(3) The CSHO may reference the sampling strategy located in OSHA Instruction CPL 2-2.20B for additional information on sampling techniques.

d. **Taking Photographs and/or Videotapes.** Photographs and/or videotapes shall be taken whenever the CSHO judges there is a need. Photographs that support violations shall be properly labeled, and may be attached to the appropriate OSHA-1B. The CSHO shall ensure that any photographs relating to confidential or trade secret information are identified as such. All film and photographs shall be retained in the case file. Videotapes shall be properly labeled and stored.

e. **Interviews.** A free and open exchange of information between the CSHO and employees is essential to an effective inspection. Interviews provide an opportunity for employees or other individuals to point out hazardous conditions and, in general, to provide assistance as to what violations of the Act may exist and what abatement action should be taken. Employee interviews are also an effective means to determine if advance notice of inspection, when given under the guidelines in Chapter I, E.3., has adversely affected the inspection conditions.

(1) **Purpose.** The Act authorizes the CSHO to question any employee privately during regular working hours in the course of an PEOSH inspection. The purpose of such interviews is to obtain whatever information the CSHO deems necessary or useful in carrying out the inspection effectively. Such interviews shall be kept as brief as possible. Individual interviews are authorized even when there is an employee representative present.

- (2) **Employee Right of Complaint.** The CSHO may consult with any employee who desires to discuss a possible violation. Upon receipt of such information, the CSHO shall investigate the alleged hazard, where possible, and record the findings. If a written complaint is received, the written response procedures in Chapter I shall be followed.
- (3) **Time and Location.** Interviews shall be conducted in a reasonable manner and normally will be conducted during the walk-around; however, they may be conducted at any time during an inspection. If necessary, interviews may be conducted at locations other than the workplace.
- (4) **Privacy.** Employers shall be informed that the interview is to be in private. Whenever an employee expresses a preference that an employee representative be present for the interview, the CSHO shall make a reasonable effort to honor that request. Any employer objection to private interviews with employees may be construed as a refusal of entry and handled in accordance with the procedures in A.2.c. of this chapter.
- (5) **Interview Statements.** Interview statements of employees or other individuals shall be obtained whenever the CSHO determines that such statements would be useful in documenting adequately an apparent violation.
 - (a) Interviews shall normally be reduced to writing, and the individual shall be encouraged to sign and date the statement. The CSHO shall assure the individual that the statement will be held confidential to the extent allowed by law, but they may be used in court/hearings. See OSHA Instruction CPL 2.98 for guidance on videotaping.
 - (b) Interview statements shall normally be written in the first person in the language of the individual.

1 Any changes or corrections shall be initialed by the individual; otherwise, the statement shall not be changed, added to or altered in any way.

2 The statements shall end with wording such as: "I have read the above, and it is true to the best of my knowledge." The statement shall also include the following: "I request that my statement be held confidential to the extent allowed by law." The individual, however, may waive confidentiality. The individual shall sign and date the statement and the CSHO shall then sign it as a witness.

3 If the individual refuses to sign the statement, the CSHO shall note such refusal on the statement. The statement shall, nevertheless, be read to the individual and an attempt made to obtain agreement. A note that this was done shall be entered into the case file. A transcription of a recorded statement shall be made if necessary.

a. Employer Abatement Assistance.

(1) **Policy.** CSHOs shall offer appropriate abatement assistance during the Walk-around as to how workplace hazards might be eliminated. The information shall provide guidance to the employer in developing acceptable abatement methods or in seeking appropriate professional assistance. CSHO's shall not imply PEOSH endorsement of any product through use of specific product names when recommending abatement measures. The issuance of citations shall not be delayed.

(2) **Disclaimers.** The employer shall be informed that:

- (a) The employer is not limited to the abatement methods suggested by PEOSH;
- (b) The methods explained are general and may not be effective in all cases; and
- (c) The employer is responsible for selecting and carrying out an effective abatement method.

5. Closing Conference.

a. At the conclusion of an inspection, the CSHO shall conduct a closing conference with the employer and the employee representatives, jointly or separately, as circumstances dictate. The closing conference may be conducted on site or by telephone as deemed appropriate by the CSHO.

NOTE: When conducting separate closing conferences for employers and labor representatives (where the employer has declined to have a joint closing conference with employee representatives), the CSHO shall normally hold the conference with employee representatives first, unless the employee representative requests otherwise. This procedure will ensure that worker input, if any, is received—and that any needed changes are made—before employers are informed of violations and proposed citations.

b. The CSHO shall describe the apparent violations found during the inspection and other pertinent issues as deemed necessary by the CSHO. Both the employer and the employee representatives shall be advised of their rights to participate in any subsequent conferences, meetings or discussions, and their context rights. Any unusual circumstances noted during the closing conference shall be documented in the case file.

(1) Since the CSHO may not have all pertinent information at the time of the first closing conference, a second closing conference may be held by telephone or in person to inform the employer and the employee representatives whether the establishment is in compliance.

(2) The CSHO shall advise the employee representatives that:

(a) Under N.J.A.C. 12:112 of the Occupational Safety and Health Review Commission regulations, if the employer contests, the employees have a right to elect “party status” before the Review Commission.

(b) They must be notified by the employer if a notice of contest or a petition for modification of abatement date is filed. They have anti discrimination rights.

(c) They have a right to contest the abatement date. Such contest must be in writing and must be filed within 15 working days after receipt of the citation.

A. Special Inspection Procedures.

1. Follow-up and Monitoring Inspections.

a. **Inspection Procedures.** The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected. Monitoring inspections are conducted to ensure that hazards are being corrected and employees are being protected, whenever a long period of time is needed for an establishment to come into compliance, or to verify compliance with the terms of granted variances. Issuance of willful, repeated and high gravity serious violations, failure to abate notifications, and/or citations related to imminent danger situations are examples of prime candidates for follow-up or monitoring inspections. Follow-up or

monitoring inspections would not normally be conducted when evidence of abatement is provided by the employer or employee representatives. Normally, there shall be no additional inspection activity unless, in the judgment of the CSHO, there have been significant changes in the workplace which warrant further inspection activity.

B. Failure to Abate.

- (1) A failure to abate exists when the employer has not corrected a violation for which a citation has been issued and abatement date has passed or which is covered under a settlement agreement, or has not complied with interim measures involved in a long-term abatement within the time given.
- (2) If the cited items have not been abated, a Notice of Failure to Abate Alleged Violation shall normally be issued. If a subsequent inspection indicates the condition has still not been abated, the Penalty Order To Comply shall be prepared and submitted to the Assistant Chief.

NOTE: If the employer has exhibited good faith, a late PMA may be considered in accordance with Chapter IV, D.2. where there are extenuating circumstances.

- (3) If it is determined that the originally cited violation was abated but then recurred, a citation for repeated violation may be appropriate.

b. Reports.

- (1) A copy of the previous OSHA-1B, OSHA-1BIH, or citation can be used, and "corrected" written on it, with a brief explanation of the correction if deemed necessary by the CSHO, for those items found to be abated. This information may alternately be included in the narrative or in video/audio documentation.
- (2) In the event that any item has not been abated, complete documentation shall be included on an OSHA-1B.

c. Follow-up Files. The follow-up inspection reports shall be included with the original (parent) case file.

2. Fatality/Catastrophe Investigations. For guidance on conducting fatality and catastrophe inspections, refer to OSHA Instruction CPL 2.77 and CPL 2.94.

a. Definitions. The following definitions apply for purposes of this section:

- (1) **Fatality.** An employee death resulting from a work-related incident or exposure; in general, from an accident or illness caused by or related to a workplace hazard.
- (2) **Catastrophe.** The hospitalization of three or more employees resulting from a work-related incident; in general, from an accident or illness caused by a workplace hazard.
- (3) **Hospitalization.** To be admitted as an **inpatient** to a hospital or equivalent medical facility for examination or treatment.
- (4) **Reporting.** Chiefs shall report all job-related fatalities and catastrophes which may result in high media attention or have national implications and that appear to be within PEOSH's jurisdiction as soon as they become aware of them to the Assistant Director.

b. **Selection of CSHO.** A CSHO, preferably with expertise in the particular industry or operation involved in the accident or illness, shall be selected by the Chief and sent to the establishment as soon as possible. If a potential criminal violation appears possible during the inspection, staff who have received criminal investigation training at the Federal Law Enforcement Training Center shall be assigned, if available.

b. Families of Victims.

(1) Family members of employees involved in fatal occupational accidents or illnesses shall be contacted at an early point in the investigation, given an opportunity to discuss the circumstances of the accident or illness, and provided timely and accurate information at all stages of the investigations as directed in (2), below.

(1) All of the following require special tact and good judgment on the part of the CSHO. In some situations, these procedures should not be followed to the letter; e.g., in some small businesses, the employer, owner, or supervisor may be a relative of the victim. In such circumstances, such steps as issuance of the form letter may not be appropriate without some editing.

(a) As soon as practicable after initiating the investigation, the CSHO shall attempt to compile a list of all of the accident victims and their current addresses, along with the names of individual(s) listed in the employer's records as next-of-kin (family member(s)) or person(s) to contact in the event of an emergency.

(b) The standard information letter should be sent to the family member(s) or the person(s) listed as the emergency contact person(s) indicated on the victims' employment records within 5 working days of the time their identities have been established.

(c) The compliance officer, when taking a statement from families of victims, shall explain that the interview will be kept confidential to the extent allowed by law and that the interview will be handled following the same procedures as employee interviews. The greatest sensitivity and professionalism is required for such an interview. The information received must be carefully evaluated and corroborated during the investigation.

(c) Follow-up contact shall be maintained with a key family member other contact person, when requested, so that the survivors can be kept up-to-date on the status of the investigation. The victim's family members shall be provided a copy of all citations issued as a result of the accident investigation within 5 working days of issuance.

d. **Rescue Operations.** PEOSH has no authority to direct rescue operations—this is the responsibility of the employer and/or of local political subdivisions or State agencies. PEOSH does have the authority to monitor and inspect the working conditions of covered employees engaged in rescue operations to make certain that all necessary procedures are being taken to protect the lives of the rescuers.

e. **Public Information Policy.** The state public information policy regarding response to fatalities and catastrophes is to explain State presence to the news media. It is not to provide a continuing flow of facts nor to issue periodic updates on the progress of the investigation. The Commissioner or his/her designee shall normally handle responses to media inquiries.

3. Imminent Danger Investigations.

a. **Definition.** N.J.A.C. 12:110-4.9 defines imminent danger as . . . any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.

b. **Requirements.** The following conditions must be met before a hazard becomes an imminent danger:

(1) It must be reasonably likely that a serious accident will occur immediately **or**, if not immediately, then before abatement would otherwise be required. If an employer contests a citation, abatement will not be required until there is a final order of the Review Commission affirming the citation.

(2) The harm threatened must be death or serious physical harm. For a health hazard, exposure to the toxic substance or other health hazard must cause harm to such a degree as to shorten life or cause substantial reduction in physical or mental efficiency even though the resulting harm may not manifest itself immediately.

a. Inspection.

(1) **Scope.** CSHO may consider expanding the scope of inspection based on the information available during the inspection process.

(3) **Elimination of the Imminent Danger.** As soon as reasonable practicable after it is concluded that conditions or practices exist which constitute an imminent danger, the employer shall be so advised and requested to notify its employees of the danger and remove them from exposure to the imminent danger. The employer should be encouraged to do whatever is possible to eliminate the danger promptly on a voluntary basis.

(a) **Voluntary Elimination of the Imminent Danger.** The employer may voluntarily and permanently eliminate the imminent danger as soon as it is pointed out. In such cases, no imminent danger proceeding need be instituted; and, no Notice of Alleged Imminent Danger completed. An appropriate citation and notification of penalty shall be issued.

(b) **Action Where the Danger is Immediate and Voluntary Elimination Is Not Accomplished.** If the employer either cannot or does not voluntarily eliminate the hazard or remove employees from the exposure and the danger is immediate, the following procedures shall be observed:

1 The CSHO shall post the OSHA-8 and call the Assistant Chief.

NOTE: The CSHO has no authority to order the closing of the operation or to direct employees to leave the area of the imminent danger or the workplace.

2 The CSHO shall notify employees and employee representatives the posting of the OSHA-8 and shall advise them of their discrimination rights.

3 The Chief shall assess the situation and make recommendations to the Assistant Director if warranted, or instruct the CSHO to remove the OSHA-8.

5 The CSHO's first priority in scheduling activities is to prepare for litigation related to TRO's in imminent danger matters.

c. Action Where the Danger is that the Harm will Occur Before Abatement is Required. If the danger is that the harm will occur before abatement is required, i.e. before a final order of the Commission can be obtained in a contested case, the CSHO shall contact the Chief.

1 In many cases, the CSHO or the Assistant Chief may not decide there is such an imminent danger at the time of the physical inspection of the facility.

- 2 In appropriate cases, the imminent danger notice may be posted at the time citations are delivered or even after the notice of contest filed.

4. **Construction Inspections.**

a. **Standards Applicability.** The standards published as 29 CFR Part 1926 have been adopted as occupational safety and health standards. They shall apply to every employment and place of employment of every employee engaged in construction work, including non-contract construction work.

b. **Definition.** The term "construction work" mean work for construction, alteration, and/or repair, including painting and decorating. These terms are discussed in 29 CFR 1926.13. If any question arises as to whether an activity is deemed to be construction for purposes of the Act, the Chief shall be consulted.

PUBLIC EMPLOYEES' OCCUPATIONAL SAFETY and HEALTH (PEOSH) FIELD INSPECTION REFERENCE MANUAL (FIRM)

CHAPTER III

INSPECTION DOCUMENTATION

A. Four Stage Case File Documentation.

1. **General Guidelines.** These guidelines are developed to assist the CSHO in determining the minimum level of written documentation appropriate for each of four case file stages. **All necessary information relative to violations shall be obtained during the inspection, using any means deemed appropriate by the CSHO (i.e., notes, audio/videotapes, photographs, and employer records).**

2. **Case File Stages.** The following paragraphs indicate what documentation is required for each of the four case file stages.

NOTE: The difference between Stage III and Stage IV is one of format and organization only. A Stage III case file is not understood as involving a lesser degree of documentation.

a. **Stage I.**

No on-site inspection conducted ---OSHA-1 or equivalent, and brief statement expanding upon the reason for not conducting the inspection.

b. **Stage II.**

In-compliance inspection ---OSHA-1 or equivalent. OSHA-1A or pertinent information (see B.1. of this chapter). Records obtained during the inspection, based on the CSHO's professional judgment as to what should be obtained.

c. **Stage III.**

Inspection conducted, citations to be issued ---OSHA-1 or equivalent. OSHA-1A or equivalent (see B.1. of this chapter). Records obtained during the inspection which, based on the CSHO's professional judgment, are necessary to support the violations. OSHA-1B forms or the equivalent with the following included:

Inspection #

Instances on page (a,b,/)

Type of violation (S,W,R,O,FTA)

Citation number and item number

Number exposed

REC

Abatement Period

SAVE, AVD, and/or standard reference

Photo/video location

Severity Rating (H,M,L) and brief justification

Probability Rating (G,L) and brief justification

GBP and multiplier if applicable

% reduction (adjustment)

Proposed penalty

NOTE: Information in relation to exposed employees shall be documented on the OSHA-1B, or referenced on the OSHA **III-1** the specific location of this information. Complainant/referral response, if completed, shall be included in the referral inspection.

d. **Stage IV**

Citations are contested ---Case file will be handled administratively.

B. **Specific Forms.**

1. **Narrative, Form OSHA-1A.**

a. **General.** The OSHA-1A Form, or its equivalent, shall be used to record information relative to the following, at a minimum:

ITEM: Establishment Name.

ITEM: Inspection Number.

ITEM: Additional Citation Mailing Addresses.

ITEM: Names and Addresses of all Organized Employee Groups.

ITEM: Names, Addresses, and Phone Numbers of Authorized Representatives of Employees.

ITEM: Employer Representatives Contacted and extent of their participation in the inspection.

ITEM: Comment on S&H program to the extent necessary, based on CSHO's Professional judgment, including penalty reduction justifications for good faith.

ITEM: Document whether closing conference was held, describe any unusual circumstances.

ITEM: Additional Comments (CSHO's shall use their professional judgment to determine if any additional information shall be added to the case file.)

b. **Specific.** The following information may be located on the OSHA-1A Form or referenced on the OSHA-1A as to the specific location of this information:

ITEM: Names, Addresses, and Phone Numbers of Other Persons Contacted.

ITEM: Accompanied By.

2. **Photo Mounting Worksheet, Form OSHA-89** This worksheet may be utilized by the CSHO, if mounting is necessary. Other methods of mounting the photograph may be used, such as attaching it to the OSHA-1B.

3. **Inspection Case File Activity Diary Insert.** The Inspection Case File Activity Diary is designed to provide a ready record and summary of all actions relating to a case. The diary sheet will be used to document important events related to the case, especially those not found elsewhere in the case file.

C. **Violations.**

1. **Basis of Violations.**

a. **Standards and Regulations.** The Public Employees Occupational Safety and Health Act states that each employer has a responsibility to comply with the occupational safety and health standards promulgated under the Act. The specific standards and regulations are found in N.J.A.C.12:100, N.J.A.C. 12:110, Title 29 Code of Federal Regulations (CFR) 1900 series. Subparts A and B of 29 CFR 1910 specifically establish the source of all the standards which are the basis of violations.

NOTE: The most specific subdivision of the standard shall be used for citing violations.

(1) **Definition and Application of Universal Standards (Horizontal) and Specific Industry Standards (Vertical).** Specific Industry standards are those standards which apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment or installations. Universal standards are those standards which

apply when a condition is not covered by a specific industry standard. Within both universal and specific industry standards there are general standards and specific standards.

(a) When a hazard in a particular industry is covered by both a specific industry (e.g., 29 CFR Part 1915) standard and a universal (e.g., 29 CFR Part 1910) standard, the specific industry standard shall take precedence. **This is true even if the universal standard is more stringent.**

(b) When determining whether a universal or a specific industry standard is applicable to a work situation, the CSHO shall focus attention on the activity in which the employer is engaged at the establishment being inspected rather than the nature of the employer's general business.

(2) **Variances.** The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in N.J.S.A. 34:6A-39.

(a) An employer will not be subject to citation if the observed condition is in compliance with either the variance or the standard.

(b) In the event that the employer is not in compliance with the requirements of the variance, a violation of the standard shall be cited with a reference in the citation to the variance provision that has not been met.

b. Employee Exposure.

(1) **Definition of Employee.** Whether or not exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question of who pays these employees may not be the determining factor.

(2) **Proximity to the Hazard.** The proximity of the workers to the point of danger of the operation shall be documented.

(3) **Observed Exposure.** Employee exposure is established if the CSHO witnesses, observes, or monitors exposure of an employee to the hazardous or suspected hazardous condition during work or work-related activities. Where a standard requires engineering or administrative controls (including work practice controls), employee exposure shall be cited regardless of the use of personal protective equipment.

(4) **Unobserved Exposure.** Where employee exposure is not observed, witnessed, or monitored by the CSHO, employee exposure is established if it is determined through witness statements or other evidence that exposure to a hazardous condition has occurred, continues to occur, or could recur.

(a) In fatality/catastrophe (or other "accident") investigations, employee exposure is established if the CSHO determines, through written statements or other evidence, that exposure to a hazardous condition occurred at the time of the accident.

(b) In other circumstances, based on the CSHO's professional judgment and determination, exposure to hazardous conditions has occurred in the past, and such exposure may serve as the basis for a violation when employee exposure has occurred in the previous six months.

(5) **Potential Exposure.** A citation may be issued when the possibility exists that an employee could be exposed to a hazardous condition because of work patterns, past circumstances, or anticipated work requirements, and it is reasonably predictable that employee exposure could occur, such as:

(a) The hazardous condition is an integral part of an employer's recurring operations, but the employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur; or

(b) The employer has not taken steps to prevent access to unsafe machinery or equipment which employees may have reason to use.

2. Types of Violations.

a. **Other-Than-Serious Violations.** This type of violation shall be cited in situations where the most serious injury or illness that would be likely to result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to exposed employees but does have a direct and immediate relationship to their safety and health.

b. **Serious Violations.**

(1) The Act provides ". . . serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

(2) The CSHO shall consider four elements to determine if a violation is serious.

(a) **Step 1.** The **types of accident** or health hazard exposure which the violated standard or the general duty clause is designed to prevent.

(b) **Step 2.** The most serious **injury or illness** which could reasonably be expected to result from the type of accident or health hazard exposure identified in Step 1.

(c) **Step 3.** Whether the results of the injury or illness identified in Step 2 could **include death or serious physical harm**. Serious physical harm is defined as:

1 Impairment of the body in which part of the body is made **functionally useless** or is **substantially reduced in efficiency** on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor.

2 Illnesses that could shorten life or significantly reduce physical or mental efficiency by inhibiting the normal function of a part of the body.

(d) **Step 4.** Whether the **employer knew**, or with the exercise of reasonable diligence could have known of the presence of the hazardous condition.

1 In this regard, the supervisor represents the employer and a supervisor's knowledge of the hazardous condition amounts to employer knowledge.

2 In cases where the employer may contend that the supervisor's own conduct constitutes an isolated event of employee misconduct, the CSHO shall attempt to determine the extent to which the supervisor was trained and supervised so as to prevent such conduct, and how the employer enforces the rule.

3 If, after reasonable attempts to do so, it cannot be determined that the employer has actual knowledge of the hazardous condition, the knowledge requirement is met if the CSHO is satisfied that the employer could have known through the exercise of reasonable diligence. As a general rule, if the CSHO was able to discover a hazardous condition, and the condition was not transitory in nature, it can be presumed that the employer could have discovered the same condition through the exercise of reasonable diligence.

c. **Violations of the General Duty Clause.** Section 6A-33 of the Act requires that "Each employer shall provide to each of his employees with employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." The general duty provisions shall be used only where there is no standard that applies to the particular hazard involved.

(1) **Evaluation of Potential Section 6A-33 Situations.** In general, Review Commission and court precedent has established that the following elements are necessary to prove a violation of the general duty clause:

- (a) The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
 - (b) The hazard was recognized;
 - (c) The hazard was causing or was likely to cause death or serious physical harm;
- and
- (d) There was a feasible and useful method to correct the hazard.

(2) **Discussion of Section 6A-33 Elements.** The above four elements of a Section 6A-33 violation are discussed in greater detail as follows:

(a) **A Hazard to Which Employees Were Exposed.** A general duty citation must involve both a serious hazard and exposure of employees.

1 **Hazard.** A hazard is a danger which threatens physical harm to employees.

a Not the Lack of a Particular Abatement Method. In the past some Section 6A-33 citations have incorrectly alleged that the violation is the failure to implement certain precautions, corrective measures or other abatement step rather than the failure to prevent or remove the particular hazard. It must be emphasized that Section 6A-33 does not mandate a particular abatement measure but only requires an employer to render the workplace free of certain hazards by any feasible and effective means which the employer wishes to utilize.

EXAMPLE: In a hazardous situation involving high pressure gas where the employer has failed to train employees properly, has not installed the proper high pressure equipment, and has improperly installed the equipment that is in place, there are three abatement measures which the employer failed to take; there is only one hazard (that is, exposure to the hazard of explosion due to the presence of high pressure gas) and hence only one general duty clause citation.

b The Hazard Is Not a Particular Accident. The occurrence of an accident does not necessarily mean that the employer has violated Section 6A-33 although the accident may be evidence of a hazard. In some cases a Section 6A-33 violation may be

unrelated to the accident. Although accident facts may be relevant and shall be gathered, the citation shall address the hazard in the workplace, not the particular facts of the accident.

EXAMPLE: A fire occurred in a workplace where flammable materials were present. No employee was injured by the fire itself but an employee, disregarding the clear instructions of his/her supervisor to use an available exit, jumped out of a window and broke a leg. The danger of fire due to the presence of flammable materials may be a recognized hazard causing or likely to cause death or serious physical harm, but the action of the employee may be an instance of unpreventable employee misconduct. The citation should deal with the fire hazard, not with the accident involving the employee who broke his/her leg.

c The Hazard Must Be Reasonably Foreseeable. The hazard for which a citation is issued must be reasonably foreseeable.

i. All the factors which could cause a hazard need not be present in the same place at the same time in order to prove foreseeability of the hazard; e.g., an explosion need not be imminent.

EXAMPLE: If combustible gas and oxygen are present in sufficient quantities in a confined area to cause an explosion if ignited but no ignition source is present or could be present, no Section 6A-33 violation would exist. If an ignition source is available at the workplace and the employer has not taken sufficient safety precautions to preclude its use in the confined area, then a foreseeable hazard may exist.

ii. It is necessary to establish the reasonable foreseeability of the general workplace hazard, rather than the particular hazard which led to the accident.

EXAMPLE: A titanium dust fire may have spread from one room to another only because an open can of gasoline was in the second room. An employee who usually worked in both rooms was burned in the second room from the gasoline. The presence of gasoline in the second room may be a rare occurrence. It is not necessary to prove that a fire in both rooms was reasonably foreseeable. It is necessary only to prove that the fire hazard, in this case due to the presence of titanium dust, was reasonably foreseeable.

2 The Hazard Must Affect the Cited Employer's Employees.

The employees exposed to the Section 6A-33 hazard must be the employees of the cited employer.

(b) **The Hazard Must be Recognized.** Recognition of a hazard can be established the basis of industry recognition, employer recognition, or "common sense" recognition. The use of common sense as the basis for establishing recognition shall be limited to special circumstances. Recognition of the hazard must be supported by satisfactory evidence and adequate documentation in the file as follows:

1 Industry Recognition. A hazard is recognized if the employer's industry recognizes it. Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of a Section 6A-33 violation. Although evidence of recognition by the employer's specific branch within an industry is preferred, evidence that the employer's industry recognizes the hazard may be sufficient.

a In cases where State and local government agencies not falling under the preemption provisions of Section 4(b)(1) have codes or regulations covering hazards not addressed by PEOSH standards, the Chief shall determine whether the hazard is to be cited under Section 6A-33 or referred to the appropriate local agency for enforcement.

b Regulations of other Federal agencies or of State atomic energy agencies generally shall not be used. They raise substantial difficulties under Section 4(b)(1) of the Act, which provides that PEOSH is preempted when such an agency has statutory authority to deal with the working condition in question.

2 Employer Recognition. A recognized hazard can be established by evidence of actual employer knowledge. Evidence of such recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the PEOSH inspection, or instances where employees have clearly called the hazard to the employer's attention.

3 Common-Sense Recognition. If industry or employer recognition of the hazard cannot be established in accordance with (a) and (b), recognition can still be established if it is concluded that any reasonable person would have recognized the hazard. This theory of recognition shall be used only in flagrant cases.

(d) **The Hazard Was Causing or Was likely Cause Death or Serious Physical Harm.** This element of Section 6A-33 violation is identical to the elements of a serious violation, see C.2.b. of this chapter.

(d) **The Hazard Can Be Corrected by a Feasible and Useful Method.**

1 To establish a Section 6A-33 violation the agency must identify a method which is feasible, available and likely to correct the hazard. The information shall indicate that the recognized hazard, rather than a particular accident, is preventable.

2 If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, a Section 6A-33 citation may be issued. A citation shall not be issued merely because the agency knows of an abatement method different from that of the employer, if the agency's method would not reduce the hazard significantly more than the employer's method. It must also be noted that in some cases only a series of abatement methods will alleviate a hazard. In such a case all the abatement methods shall be mentioned.

(4) **limitations on Use of the General Duty Clause.** Section 6A-33 is to be used only within the guidelines given in C.2.c. of this chapter.

(a) Section 6A-33 may be cited in the alternative when a standard is cited to cover a situation where there is doubt as to whether standard applies to the hazard.

(c) Section 6A-33 violations shall not be grouped together, but may be grouped with a related violation of a specific standard.

(c) Section 6A-33 shall not normally be used to impose a stricter requirement than that required by the standard. For example, if the standard provides for a permissible exposure limit (PEL) of 5 ppm, even if data establishes that a 3 ppm level is a recognized hazard, Section 6A-33 shall not be cited to require that the 3 ppm level be achieved unless the limits are based on different health effects. If the standard has only a time-weighted average permissible exposure level and the hazard involves exposure above a recognized ceiling level, the Chief shall consult with the assigned Deputy Attorney General.

NOTE: An exception to this rule may apply if it can be documented that "an employer knows a particular safety or health standard is inadequate to protect his workers against the specific hazard it is intended to address."

(d) Section 6A-33 shall normally not be used to require an abatement method

not set forth in a specific standard. If a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, Section 6A-33 shall not be cited to require medical surveillance.

(e) Section 6A-33 shall not be used to enforce "should" standards.

(b) Section 6A-33 shall not normally be used to cover categories of hazards exempted by a standard. If, however, the exemption is in place because the drafters of the standard (or source document) declined to deal with the exempt category for reasons other than the lack of a hazard, the general duty clause may be cited if all the necessary elements for such a citation are present.

(5) **Pre-Citation Review.** Section 6A-33 citations shall undergo a pre-citation review following established office procedures when required by Chief or Assistant Chief.

NOTE: If a standard does not apply and all criteria for issuing a Section 6A-33 citation are not met, but it is determined that the hazard warrants some type of notification, a letter shall be sent to the employer and the employee representative describing the hazard and suggesting corrective action.

d. **Willful Violations.** The following definitions and procedures apply whenever the CSHO suspects that a willful violation may exist:

(1) A willful violation exists under the Act where the evidence shows either an intentional violation of the Act or plain indifference to its requirements.

(a) The employer committed an intentional and knowing violation if:

1 An employer representative was aware of the requirements of the Act, or the existence of an applicable standard or regulation, and was also aware of a condition or practice in violation of those requirements, and did not abate the hazard.

2 An employer representative was not aware of the requirements of the Act or standards, but was aware of a comparable legal requirement (e.g., state or local law) and was also aware of a condition or practice in violation of that requirement, and did not abate the hazard.

(b) The employer committed a violation with plain indifference to the law where:

1 Higher management officials were aware of a PEOSH requirement applicable to the facility's business but made little or no effort to communicate the requirement to lower level supervisor and employees.

2 Facility officials were aware of a continuing compliance problem but made little or no effort to avoid violations.

EXAMPLE: Repeated issuance of citations addressing the same or similar conditions.

1 An employer representative was not aware of any legal requirement, but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, media coverage, or, in some cases, complaints of employees or their representatives.

2 Finally, in particularly flagrant situations, willfulness can be found despite lack of knowledge of either a legal requirement or the existence of a hazard if the circumstances show that the employer would have placed no importance on such knowledge even if he or she had possessed it, or had no concern for the health or safety of employees.

(3) It is not necessary that the violation be committed with a bad purpose or an evil intent to be deemed "willful." It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent.

(4) The CSHO shall carefully develop and record during the inspection, all evidence available that indicates employer awareness of and the disregard for statutory obligations or of the hazardous conditions. Willfulness could exist if an employer is advised by employees or employee representatives of an alleged hazardous condition and the employer makes no reasonable effort to verify and correct the condition. Additional factors which can influence a decision as to whether violations are willful include:

(a) The nature of the employer's business and the knowledge regarding safety and health matters which could reasonably be expected in the industry.

(b) The precautions taken by the employer to limit the hazardous conditions.

(c) The employer's awareness of the Act and of the responsibility to provide safe and healthful working conditions.

(d) Whether similar violations and/or hazardous conditions have been brought to the attention of the employer.

(e) Whether the nature and extent of the violations disclose a **purposeful disregard** of the employer's responsibility under the Act.

(3) If the Office cannot determine whether to issue a citation as a willful or a repeat violation due to the raising of difficult issues of law and policy which will require the evaluation of complex factual situations.

e **Repeated Violations.** An employer may be cited for a repeated violation if that employer has been cited previously for a **substantially similar condition** and the citation has become a final order.

(1) **Identical Standard.** Generally, similar conditions can be demonstrated by showing that in both situations the identical standard was violated.

EXCEPTION: Previously a citation was issued for a violation of 29 CFR 1910.132(a) for not requiring the use of safety-toe footwear for employees. A recent inspection of the same establishment revealed a violation of 29 CFR 1910.132(a) for not requiring the use of head protection (hard hats). Although the same standard was involved, the hazardous conditions found were not substantially similar and therefore a repeated violation would not be appropriate.

(2) **Different Standards.** In some circumstances, similar conditions can be demonstrated when different standards are violated. Although there may be different standards involved, the hazardous conditions found could be substantially similar and therefore a repeated violation would be appropriate.

(3) **Time limitations.** Although there are no statutory limitations upon the length of time that a citation may serve as a basis for a repeated violation, the following policy shall be used in order to ensure uniformity.

(a) A citation will be issued as a repeated violation if:

1 The citation is issued within 3 years of the final order of the previous citation, or,

2 The citation is issued within 3 years of the final abatement date of that citation, whichever is later.

(b) When a violation is found during an inspection, and a repeated citation has been issued for a substantially similar condition which meets the above time limitations, the violation may be classified as a second instance repeated violation with corresponding increase in penalty (see Chapter IV, C.2.I.).

(c) For any further repetition, the Assistant Director shall be consulted for guidance.

(4) **Obtaining Inspection History.** For purpose of determining whether a violation is repeated, the following criteria shall apply:

(a) **High Gravity Serious Violations.** When high gravity serious violations are to be cited, the Chief shall obtain a history of citations previously issued to this employer at all of its identified establishments, statewide. Under special circumstances, the Chief may also issue citations for repeated violations.

1 Multi-facility Employer. A multi-facility employer shall be cited for a repeated violation if the violation recurred at any worksite within the PEOSH jurisdiction.

EXAMPLE: Where the construction site extends over a large area and/or the scope of the job is unclear (such as road building), that portion of the workplace specified in the employer's contract which falls within the PEOSH jurisdiction is the establishment. If an employer has several worksites within the jurisdiction, a citation of a violation at Site A will serve as the basis for a repeated citation in Area B.

(5) **Repeated vs. Willful.** Repeated violations differ from willful violations in that they may result from an inadvertent, accidental or ordinarily negligent act. Where a repeated violation may also meet the criteria for willful but not clearly so, a citation for a repeated violation shall normally be issued.

(6) **Repeated vs. Failure to Abate.** A failure to abate situation exists when an item of equipment or condition previously cited has never been brought into compliance and is noted at a later inspection. If, however, the violation was not continuous (i.e., if it had been corrected and then reoccurred), the subsequent occurrence is a repeated violation.

(7) **Alleged Violation Description (AVD).** If a repeated citation is issued, the CSHO must ensure that the cited employer is fully informed of the previous violations serving as a basis for the repeated citation, by notation in the AVD portion of the citation, using the following or similar language:

THE (EMPLOYER'S NAME) WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD (NAME PREVIOUSLY CITED STANDARD) WHICH WAS CONTAINED IN PEOSH INSPECTION NUMBER_____, CITATION NUMBER_____, ITEM NUMBER_____, ISSUED ON (DATE), WITH RESPECT TO A WORKPLACE LOCATED AT _____.

C. 3. Health Standard Violations.

a. **Citation of Ventilation Standards.** In cases where a citation of a ventilation standard may be appropriate, consideration shall be given to standards intended to control exposure to recognized hazardous levels of air contaminants, to prevent fire or explosions, or to regulate operations which may involve confined space or specific hazardous conditions. In applying these standards, the following guidelines shall be observed:

(1) **Health-Related Ventilation Standards.** An employer may be considered in compliance with a health-related airflow ventilation standard when the employee exposure does not exceed appropriate airborne contaminant standards; e.g., the PELs prescribed in 29 CFR 1910.1000, these situations shall be reported to your supervisor.

(a) Where an over-exposure to an airborne contaminant is detected, the appropriate air contaminant engineering control requirement shall be cited; e.g., 29 CFR 1910.1000(e). In no case shall citations of this standard be issued for the purpose of requiring specific volumes of air to ventilate such exposures.

(b) Other requirements contained in health-related ventilation standards shall be evaluated without regard to the concentration of airborne contaminants.

(2) **Fire- and Explosion-Related Ventilation Standards.** Although they are not technically health violations, the following guidelines shall be observed when citing fire- and explosion-related ventilation standards:

(a) **Adequate Ventilation.** In the application of fire- and explosion- related ventilation standards, PEOSH considers that an operation has **adequate** ventilation when both of the following criteria are met:

1 The requirement of the specific standard has been met.

2 The concentration of flammable vapors is 25 percent or less of the lower explosive limit (LEL).

EXCEPTION: Certain standards specify violations when 10 percent of the LEL is exceeded. These standards are found in maritime and construction exposures.

(b) **Citation Policy.** If 25 percent (10 percent when specified for maritime or construction operations) of the LEL has been exceeded and:

1 The standard requirements have not been met, the standard violation normally shall be cited as serious.

2 There is no applicable specific ventilation standard, Section 6A-33 of the Act shall be cited in accordance with the guidelines given in C.2.c. of this chapter.

b. **Violations of the Noise Standard.** Current enforcement policy regarding 29 CFR 1910.95(b)(1) allows employers to rely on personal protective equipment and a hearing conservation program rather than engineering and/or administrative controls when hearing protectors will effectively attenuate the noise to which the employee is exposed to acceptable levels as specified in Tables G-16 or G-16a of the standard.

(1) Citations for violations of 29 CFR 1910.95(b) (1) shall be issued when engineering and/or administrative controls are feasible, both technically and economically; and

(a) Employee exposure levels are so high that hearing protectors alone may not reliably reduce noise levels received by the employee's ear to the levels specified in Tables G-16 or G-16a of the standard. Given the present state of the art, hearing protectors which offer the greatest attenuation may not reliably be used when employee exposure levels border on 100 dBA; or

(b) The costs of engineering and/or administrative controls are less than the cost of an effective hearing conservation program.

(2) A control is not reasonably necessary when an employer has an ongoing hearing conservation program and the results of audiometric testing indicate that existing controls and hearing protectors are adequately protecting employees. (In making this decision such factors as the exposure levels in question, the number of employees tested, and the duration of the testing program shall be taken into consideration.)

(3) When employee noise exposures are less than 100 dBA but the employer does not have an ongoing hearing conservation program or the results of audiometric testing indicate that the employer's existing program is not working, the CSHO shall consider whether:

(a) Reliance on an effective hearing conservation program would be less costly than engineering and/or administrative controls.

(b) An effective hearing conservation program can be established or improvements can be made in an existing hearing conservation program which could bring the employer into compliance with Tables G-16 or G-16a.

(c) Engineering and/or administrative control are both technically and economically feasible.

(4) If noise levels received by the employee's ear can be reduced to the levels specified in Tables G-16 or G-16a by means of hearing protectors and an effective hearing conservation program, citations under the hearing conservation shall normally be issued rather than citations requiring engineering controls. If improvements in the hearing conservation program cannot be made or, if made, cannot be expected to reduce exposure sufficiently and feasible controls exist, a citation under 1910.95(b) (1) shall normally be issued.

(5) When hearing protection is required but not used and employee exposure exceeds the limits of Table G-16, 29 CFR 1910.95(i) (2)(i) shall be cited and classified as serious (see (8), below) whether or not the employer has instituted a hearing conservation program.

NOTE: Citations of 29 CFR 1910.95(i)(2)(ii)(b) shall also be classified as serious.

C. 3. b. (6) If an employer has instituted a hearing conservation program and a violation of the hearing conservation amendment (other than 1910.95 (i)(2)(i) or (i)(2)(ii)(b)) is found, a citation shall be issued if employee noise exposures equal or exceed an 8-hour time-weighted average of 85 dB.

(7) If the employer has not instituted a hearing conservation program and employee noise exposures equal or exceed an 8-hour time-weighted average of 85 dB, a citation for 1910.95c only shall be issued.

(8) Violations of 1910.95(i)(2)(i) from the hearing conservation amendment may be grouped with violations of 29 CFR 1910.95(b)(1) and classified as serious when an employee is exposed to noise levels above the limits of Table G-16 and:

(a) Hearing protection is not utilized or is not adequate to prevent overexposure to an employee; or

(b) There is evidence of hearing loss which could reasonably be considered:

1 To be work-related, and

2 To have been preventable, at least to some degree, if the employer had been in compliance with the cited provisions.

(9) When an employee is overexposed but effective hearing protection is being provided and used, an effective hearing conservation program has been implemented and no feasible engineering or administrative controls exist, a citation shall not be issued.

c. Violations of the Respirator Standard. When considering a citation for respirator violations, the following guidelines shall be observed:

(1) **In Situations Where Overexposure Does Not Occur.** Where an overexposure has not been established:

(a) But an improper type of respirator is being used (e.g., a dust respirator being used to reduce exposure to organic vapors), a citation under 29 CFR 1910.134(b)(2) shall be issued.

(b) And one or more of the other requirements of 29 CFR 1910.134 is not being met; e.g., an unapproved respirator is being used to reduce exposure to toxic dusts, a citation shall be issued.

(c) A citation may be warranted if an adverse health condition due to the respirator itself could be supported and documented. Examples may include a dirty respirator that is causing dermatitis, a worker's health being jeopardized by wearing a respirator due to an inadequately evaluated medical condition or a significant ingestion hazard created by an improperly cleaned respirator.

(2) **In Situations Where Overexposure Does Occur.** In cases where an overexposure to an air contaminant has been established, the following principles apply to citations of 1910.134:

(1) 29 CFR 1910.134(a)(2) is the general section requiring employers to provide respirators ". . . when such equipment is necessary to protect the health of the employee" and requiring the establishment and maintenance of a respiratory protection program which meets the requirements outlined in 29 CFR 1910.134(b). Thus, if no respiratory program at all has been established, 1910.134(a)(2) alone shall be cited; if a program has been established and some, but not all, of the requirements under 1910.134(b) are being met, the specific standards under 1910.134(b) that are applicable shall be cited.

(2) An acceptable respiratory protection program includes all of the elements of 29 CFR 1910.134; however, the standard is structured such that essentially the same requirement is often specified in more than one section. In these cases, the section which most adequately describes the violation shall be cited, eg: An improper type of respirator is being used a citation under 29 CFR 1910.134 (b)(2) shall be issued.

d. Additive and Synergistic Effects.

(1) Substances which have a known additive effect and, therefore, result in a greater probability/severity of risk when found in combination shall be evaluated using the formula found

in 29 CFR 1910.1000(d)(2). The use of this formula requires that the exposures have an additive effect on the same body organ or system.

(2) If the CSHO suspects that synergistic effects are possible, it shall be brought to the attention of the supervisor, who shall refer the question to the Assistant Director. If it is decided that there is a synergistic effect of the substances found together, the violations shall be grouped, when appropriate, for purposes of increasing the violation classification severity and/or the penalty.

e. **Absorption and Ingestion Hazards.** The following guidelines apply when citing absorption and ingestion violations. Such citations do **not** depend on measurements of airborne concentrations, but shall normally be supported by wipe sampling.

(1) Citations under 29 CFR 1910.132, 1910.141 and/or Section 6A-33 may be issued when there is reasonable probability that employees will be exposed to these hazards.

(2) Where, for any substance, a serious hazard is determined to exist due to the potential of ingestion or absorption of the substance for reasons other than the consumption of contaminated food or drink (e.g., smoking materials contaminated with the toxic substance), a serious citation shall be considered under Section 6A-33 of the Act.

f. **Biological Monitoring.** If the employer has been conducting biological monitoring, the CSHO shall evaluate the results of such testing. The results may assist in determining whether a significant quantity of the toxic material is being ingested or absorbed through the skin.

4. **Writing Citations.**

a. **General.**

(1) **Section 9(a).** “. . . the Commissioner or his authorized representative . . . shall with reasonable promptness issue a citation to the employer.” To facilitate the prompt issuance of citations, the Chief may issue citations which are unrelated to health inspection air sampling, prior to receipt of sampling results.

C. 4. a. (2) **Section 9©.** “No citation may be issued . . . after the expiration of six months following the occurrence of any violation.” Accordingly a citation shall not be issued where any violation alleged therein last occurred 6 months or more prior to the date on which the citation is actually signed and dated. Where the actions or omissions of the employer concealed the existence of the violation, the time limitation is suspended until such time that OPEOSH learns or could have learned of the violation. The Regional Solicitor shall be consulted in such cases.

b. **Alternative Standards.**

(1) In rare cases, the same factual situation may present a possible violation of more than one standard. For example, the facts which support a violation of 29 CFR 1910.28(a)(1) may also support a violation of 1910.132(a) if no scaffolding is provided when it should be and the use of safety belts is not required by the employer.

(2) Where it appears that more than one standard is applicable to a given factual situation and that compliance with any of the applicable standards would effectively eliminate the hazard, it is permissible to cite alternative standards using the words “in the alternative.” A reference in the citation to each of the standards involved shall be accompanied by a separate Alleged Violation Description (AVD) which clearly alleges all of the necessary elements of a violation of that standard. Only one penalty shall be proposed for the violative condition.

5. Combining and Grouping of Violations.

a. **Combining.** Violations of a single standard having the same classification found during the inspection of an establishment or worksite generally shall be combined into one alleged citation item. Different options of the same standard shall normally also be combined. Each instance of the violation shall be separately set out within that item of the citation. Other-than-serious violations of a standard may be combined with serious violations of the same standard when appropriate.

NOTE: Except for standards which deal with multiple hazards (e.g., Tables Z-1, Z-2 and Z-3 cited under 29 CFR 1910.1000 (a), (b), or (c)), the same standard may not be cited more than once on a single citation. The same standard may be cited on different citations on the same inspection, however.

b. **Grouping.** When a source of a **hazard** is identified which involves interrelated violations of different standards, the violations may be grouped into a single item. The following situations normally call for grouping violations:

C. 5. b. (1) **Grouping Related Violations.** When the CSHO believes that violations classified either as serious or as other-than-serious are so closely related as to constitute a single hazardous condition.

(2) **Grouping Other-Than-Serious Violations Where Grouping Results in a Serious Violation.** When two or more individual violations are found which, if considered individually represent other-than-serious violations, but if grouped create a substantial probability of death or serious physical harm.

(3) **Where Grouping Results in Higher Gravity Other-Than-Serious Violation.** Where the CSHO finds during the course of the inspection that a number of other-than-serious violations are present in the same piece of equipment which, considered in relation to each other affect the overall gravity of possible injury resulting from an accident involving the combined violations.

(4) **Violations of Posting and Recordkeeping Requirements.** Violations of the posting and recordkeeping requirements which involve the same document; e.g., PEOSH-300 Form was not posted or maintained. (See Chapter IV, C.2.n. for penalty amounts.)

(5) **Penalties for Grouped Violations.** If penalties are to be proposed for grouped violations, the penalty shall be written across from the first violation item appearing on the OSHA-2.

c. **When Not to Group.** Times when grouping is normally inappropriate.

(1) **Multiple Inspections.** Violations discovered in multiple inspections of a single establishment or worksite may not be grouped. An inspection in the same establishment or at the same worksite shall be considered a single inspection even if it continues for a period of more than one day or is discontinued with the intention of resuming it after a short period of time if only one OSHA-1 is completed.

(2) **Separate Establishments of the Same Employer.** Where inspections are conducted, either at the same time or different times, at two establishments of the same employer and instances of the same violation are discovered during each inspection, the employer shall be issued separate citations for each establishment. The violations shall not be grouped.

(3) **General Duty Clause Violations.** Because Section 6A-33 of the Act is cited so as to cover all aspects of a serious hazard for which no standard exists, **no** grouping of separate Section 6A-33 violations is permitted. This provision, however, does not prohibit grouping a Section 6A-33 violation with a related violation of a specific standard.

(4) **Egregious Violations.** Violations which are proposed as violation-by-violation citations shall **not** normally be combined or grouped. (See OSHA Instruction CPL 2.80.)

C. 6. This paragraph has been replaced by a revised multi-employer policy contained in [OSHA Instruction CPL 2-0.124](#).

7. Employer/Employee Responsibilities.

a. The Act states: "Each employee shall comply with occupational safety and health standards and all regulations promulgated under this Act which are applicable to his own actions and conduct."

b. In cases where the CSHO determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Chief who shall consult with the Assistant Director.

c. Under no circumstances is the CSHO to become involved in an **onsite** dispute involving labor-management issues or interpretation of collective-bargaining agreements. The CSHO is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with the Act. Concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge.

8. Affirmative Defenses.

a. **Definition.** An affirmative defense is any matter which, if established by the employer, will excuse the employer from a violation which has otherwise been proved by the CSHO.

b. **Burden of Proof.** Although affirmative defenses must be proved by the employer at the time of the hearing, PEOSH must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense. The CSHO, therefore, shall keep in mind the potential affirmative defenses that the employer may make and attempt to gather contrary evidence when a statement made during the inspection fairly raises a defense. The CSHO should bring the documentation of the hazards and facts related to possible affirmative defenses to the attention of the Assistant Chief. Where it appears that each and every element of an affirmative defense is present, the Chief may decide that a citation is not warranted.

C. 8. c. **Explanations.** The following are explanations of the more common affirmative defenses with which the CSHO shall become familiar. There are other affirmative defenses besides these, but they are less frequently raised or are such that the facts which can be gathered during the inspection are minimal.

(1) **Unpreventable Employee Misconduct or "Isolated Event"**. The violative condition was:

(a) Unknown to the employer; and

(b) In violation of an adequate work rule which was effectively communicated and uniformly enforced.

EXAMPLE: An unguarded table saw is observed. The saw, however, has a guard which is reattached while the CSHO watches. Facts which the CSHO shall document may include: Who removed the guard and why? Did the employer know that the guard had been removed? How long or how often had the saw been used without guards? Did the employer have a work rule that the saw guards not be removed? How was the work rule communicated? Was the work rule enforced?

(2) **Impossibility.** Compliance with the requirements of a standard is:

- (a) Functionally impossible or would prevent performances of required work; and
- (b) There are no alternative means of employee protection.

EXAMPLE: During the course of the inspection an unguarded table saw is observed. The employer states that the nature of its work makes a guard unworkable. Facts which the CSHO shall document may include: Would a guard make performance of the work impossible or merely more difficult? Could a guard be used part of the time? Has the employer attempted to use guards? Has the employer considered alternative means or methods of avoiding or reducing the hazard?

(3) **Greater Hazard.** Compliance with a standard would result in greater hazards to employees than noncompliance and:

- (a) There are no alternative means of employee protection; and
- (b) An application of a variance would be inappropriate.

EXAMPLE: The employer indicates that a saw guard had been removed because it caused particles to be thrown into the operator's face. Facts which the CSHO shall consider may include: Was the guard used properly? Would a different type of guard eliminate the problem? How often was the operator struck by particles and what kind of injuries resulted? Would safety glasses, a face mask, or a transparent shelf attached to the saw prevent injury? Was operator technique at fault and did the employer attempt to correct it? Was a variance sought?

(4) **Multi-employer Worksites.** Refer to C.6. of this chapter.

PUBLIC EMPLOYEES' OCCUPATIONAL SAFETY and HEALTH (PEOSH) FIELD INSPECTION REFERENCE MANUAL (FIRM)

CHAPTER IV

POST-INSPECTION PROCEDURES

A. Abatement.

1. **Period.** The abatement period shall be the shortest interval within which the employer can **reasonably** be expected to correct the violation. An abatement date shall be set forth in the citation as a specific date, not a number of days. When the abatement period is very short (i.e., 5 working days or less) and it is uncertain when the employer will receive the citation, the abatement date shall be set so as to allow for a mail delay and the agreed-upon abatement time. When abatement has been witnessed by the CSHO during the inspection, the abatement period shall be "Corrected During Inspection" on the citation.

2. **Reasonable Abatement Date.** The establishment of the shortest practicable abatement date requires the exercise of professional judgment on the part of the CSHO.

NOTE: Abatement periods exceeding 30 calendar days should not normally be necessary, particularly for safety violations. Situations may arise, however, especially for health violations, where extensive structural changes are necessary or where new equipment or parts cannot be delivered within 30 calendar days. When an initial abatement date is granted that is in excess of 30 calendar days, the reason, if not self-evident, shall be documented in the case file.

3. **Verification of Abatement.** The Chief is responsible for determining if abatement has been accomplished. When abatement is not accomplished during the inspection or the employer does not notify the Assistant Director by letter of the abatement, verification shall be determined by telephone and documented in the case file.

NOTE: If the employer's abatement letter indicates that a condition has not been abated, but the date has passed, the Chief shall contact the employer for an explanation. The Assistant Director shall explain Petition for Modification of Abatement (PMA) procedures to the employer, if applicable.

4. **Effect of Contest Upon Abatement Period.** In situations where an employer contests either (1) the period set for abatement or (2) the citation itself, the abatement period generally shall be considered not to have begun until there has been an affirmation of the citation and abatement period.

a. Where an employer has contested only the proposed penalty, the abatement period continues to run unaffected by the contest.

b. Where the employer does not contest, he must abide by the date set forth in the citation even if such date is within the 15-working-day notice of contest period. Therefore, when the abatement period designated in the citation is 15 working days or less and a notice of contest has not been filed, a follow-up inspection of the worksite may be conducted for purposes of determining whether abatement has been achieved within the time period set forth in the citation. A failure to abate notice may be issued on the basis of the CSHO's findings.

. Long-Term Abatement Date for Implementation of Feasible Engineering Controls.

Long-term abatement is abatement which will be completed more than one year from the citation issuance date. In situations where it is difficult to set a specific abatement date when the citation is originally issued; e.g., because of extensive redesign requirements consequent upon the employer's decision to implement feasible engineering controls and uncertainty as to when the job can be finished, the CSHO shall discuss the problem with the employer at the closing conference and, in appropriate cases, shall encourage the employer to seek an informal conference with the Assistant Director.

a. **Final Abatement Date.** The CSHO and the Assistant Chief shall make their best judgment as to a reasonable abatement date. A specific date for final abatement shall, in all cases, be included in the citation. The employer shall not be permitted to propose an abatement plan setting its own abatement dates. If necessary, an appropriate petition may be submitted later by the employer to the Chief to modify the abatement date. (See D.2. of this chapter for PMA's.)

b. **Employer Abatement Plan.** The employer is required to submit an abatement plan outlining the anticipated long-term abatement procedures.

NOTE: A statement agreeing to provide PEOSH with written periodic progress reports shall be part of the long-term abatement plan.

A. **6. Feasible Administrative, Work Practice and Engineering Controls.** Where applicable, the CSHO shall discuss control methodology with the employer during the closing conference.

a. **Definitions.**

(1) **Engineering Controls.** Engineering controls consist of substitution, isolation, ventilation and equipment modification.

(2) **Administrative Controls.** Any procedure which significantly limits daily exposure by control or manipulation of the work schedule or manner in which work is performed is considered a means of administrative control. The use of personal protective equipment is **not** considered a means of administrative control.

(3) **Work Practice Controls.** Work practice controls are a type of administrative controls by which the employer modifies the manner in which the employee performs assigned work. Such modification may result in a reduction of exposure through such methods as changing work habits, improving sanitation and hygiene practices, or making other changes in the way the employee performs the job.

(4) **Feasibility.** Abatement measures required to correct a citation item are feasible when they can be accomplished by the employer. The CSHO, following current directions and guidelines, shall inform the employer, where appropriate, that a determination will be made as to whether engineering or administrative controls are feasible.

(a) **Technical Feasibility.** Technical feasibility is the existence of technical know-how as to materials and methods available or adaptable to specific circumstances which can be applied to cited violations with a reasonable possibility that employee exposure to occupational hazards will be reduced.

(b) **Economic Feasibility.** Economic feasibility means that the employer is financially able to undertake the measures necessary to abate the citations received.

NOTE: If an employer's level of compliance lags significantly behind that of similar workplaces, allegations of economic infeasibility will not be accepted.

b. **Responsibilities.**

(1) The CSHO shall document the underlying facts which give rise to an employer's claim of infeasibility.

(a) When economic infeasibility is claimed the CSHO shall inform the employer that, although the cost of corrective measures to be taken will generally not be considered as a factor in the issuance of a citation, it may be considered during an informal conference or during settlement negotiations.

(b) Serious issues of feasibility should be referred to the Chief for determination.

(2) The Chief is responsible for making determinations that engineering or administrative controls are or are not feasible.

c. **Reducing Employee Exposure.** Whenever feasible engineering, administrative or work practice controls can be instituted even though they are not sufficient to eliminate the hazard (or to reduce exposure to or below the permissible exposure limit (PEL)). Nonetheless, they are required in conjunction with personal protective equipment to reduce exposure to the lowest practical level.

B. Citations.

1. Issuing Citations.

a. **Sending Citations to the Employer.** Citations shall be sent by certified mail; hand delivery of citations to the employer or an appropriate agent of the employer may be substituted for certified mailing if it is believed that this method would be more effective. A signed receipt shall be obtained whenever possible; otherwise the circumstances of delivery shall be documented in the file.

b. **Sending Citations to the Employee.** Citations shall be mailed to employee representatives no later than one day after the citation is sent to the employer. Citations shall also be mailed to any employee upon request.

c. **Follow-up Inspections.** If a follow-up inspection reveals a failure to abate, the time specified for abatement has passed, and no notice of contest has been filed, a Notification of Failure to Abate Alleged Violation (OSHA-2B) may be issued immediately without regard to the contest period of the initial citation.

2. Amending or Withdrawing Citation and Notification of Penalty in Part or In Its Entirety.

a. **Citation Revision Justified.** Amendments to or withdrawal of a citation shall be made when information is presented to the Chief which indicates a need for such revision under certain conditions which may include:

- (1) Administrative or technical error.
 - (a) Citation of an incorrect standard.
 - (b) Incorrect or incomplete description of the alleged violation.
- (2) Additional facts establish a valid affirmative defense.
- (3) Additional facts establish that there was no employee exposure to the hazard.

(4) Additional facts establish a need for modification of the correction date, or the penalty, or reclassification of citation items.

b. **Citation Revision Not Justified.** Amendments to or withdrawal of a citation shall not be made by the Assistant Director under certain conditions which include:

(1) Valid notice of contest received.

(2) The 15 working days for filing a notice of contest has expired and the citation has become a final order.

(3) Employee representatives have not been given the opportunity to present their views unless the revision involves only an administrative or technical error.

(4) Editorial and/or stylistic modifications.

c. **Procedures for Amending or Withdrawing Citations.** The following procedures are to be followed in amending or withdrawing citations. The instructions contained in this section, with appropriate modification, are also applicable to the amendment of the Notification of Failure to Abate Alleged Violation, OSHA-2B Form:

(1) Withdrawal of or modifications to the citation and notification of penalty, shall normally be accomplished by means of an informal settlement agreement (ISA). (See D.4.b. of this chapter for further information in ISA's).

(2) Changes initiated by the Chief without an informal conference are exceptions. In such cases the procedures given below shall be followed:

(a) If proposed amendments to citation items change the classification of the items; e.g., serious to other-than-serious, the original citation items shall be withdrawn and new, appropriate citation items issued.

(b) The amended Citation and Notification of Penalty Form (OSHA-2) shall clearly indicate that:

1 The employer is obligated under the Act to post the amendment to the citation along with the original citation until the amended violation has been corrected or for 3 working days, whichever is longer;

2 The period of contest of the amended portions of the PEOSH-2 will begin from the day following the date of receipt of the amended Citation and Notification of Penalty; and

3 The contest period is not extended as to the unamended portions of the original citation.

(c) A copy of the original citation shall be attached to the amended Citation and Notification of Penalty Form when the amended form is forwarded to the employer.

(d) When circumstances warrant it, a citation may be withdrawn in its entirety by the Chief. Justifying documentation shall be placed in the case file. If a citation is to be withdrawn, the following procedures apply:

1 A letter withdrawing the Citation and Notification of Penalty shall be sent to the employer. The letter shall refer to the original citation and penalty, state that they are withdrawn and direct that the letter be posted by the employer for 3 working days in those locations where the original citation was posted.

2 When applicable to the specific situation (e.g., an employee representative participated in the walk-around inspection, the inspection was in response to a complaint signed by an employee or an employee representative, or the withdrawal resulted from an informal conference or settlement agreement in which an employee representative exercised the right to participate), a copy of the letter shall also be sent to the employee or the employee representative as appropriate.

C. Penalties.

1. General Policy. The penalty structure provided N.J.S.A.34:6A-41 of the Act is designed primarily to provide an incentive toward correcting violations voluntarily, not only to the offending employer but, more especially, to other employers who may be guilty of the same infractions of the standards or regulations.

a. While penalties are not designed primarily as punishment for violations, the NJ Legislature has made clear its intent that penalty amounts should be sufficient to serve as an effective deterrent to violations.

b. Large proposed penalties, therefore, serve the public purpose intended under the Act; and criteria guiding approval of such penalties by the Commissioner of Labor are based on meeting this public purpose

c. The penalty structure outlined in this section is designed as a general guideline. The Chief may deviate from this guideline if warranted, to achieve the appropriate deterrent effect.

2. Civil Penalties.

a. **Statutory Authority.** N.J.S.A. 34:6A-41 provides the Commissioner of Labor with the statutory authority to propose civil penalties for violations of the Act.

(1) The PEOSH Act provides that any employer who has received a citation for an alleged violation of the Act which is determined to be of a serious nature shall be assessed a civil penalty of up to \$7,000 per day for each violation.

b. **Penalty Factors.** N.J.S.A.34:12:110-4:11 provides that penalties shall be assessed on the basis of four factors:

- (1) The gravity of the violation,
- (2) The size of the business,
- (3) The good faith of the employer, and
- (4) The employer's history of previous violations.

c. **Gravity of Violation.** The gravity of the violation is the primary consideration in determining penalty amounts. It shall be the basis for calculating the basic penalty for both serious and other violations. To determine the gravity of a violation the following two assessments shall be made:

- (1) The severity of the injury or illness which could result from the alleged violation.
- (2) The probability that an injury or illness could occur as a result of the alleged violation.

d. **Severity Assessment.** The classification of the alleged violations as serious or other-than-serious, in accordance with the instructions in Chapter III, C.2., is based on the severity of the injury or illness that could result from the violation. This classification constitutes the first step in determining the gravity of the violation. A severity assessment shall be assigned to a hazard to be cited according to the most serious injury or illness which could reasonably be expected to result from an employee's exposure as follows:

(1) **High Severity:** Death from injury or illness; injuries involving permanent disability; or chronic, irreversible illnesses.

(2) **Medium Severity:** Injuries or temporary, reversible illnesses resulting in hospitalization or a variable but limited period of disability.

(3) **Low Severity:** Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment.

(4) **Minimal Severity:** Other-than-serious violations. Although such violations reflect conditions which have a direct and immediate relationship to the safety and health of employees, the injury or illness most likely to result would probably not cause death or serious physical harm.

d. **Probability Assessment.** The probability that an injury or illness will result from a hazard has no role in determining the classification of a violation but does affect the amount of the penalty to be proposed.

(1) **Categorization.** Probability shall be categorized either as greater or as lesser probability.

(a) Greater probability results when the likelihood that an injury or illness will occur is judged to be relatively high.

(b) Lesser probability results when the likelihood that an injury or illness will occur is judged to be relatively low.

(2) **Violations.** The following circumstances may normally be considered, as appropriate, when violations likely to result in injury or illness are involved:

(a) Number of workers exposed.

(b) Frequency of exposure or duration of employee overexposure to contaminants.

(c) Employee proximity to the hazardous conditions.

(d) Use of appropriate personal protective equipment (PPE).

(e) Medical surveillance program.

(f) Youth and inexperience of workers, especially those under 18 years old.

(g) Other pertinent working conditions.

(3) **Final Probability Assessment.** All of the factors outlined above shall be considered together in arriving at a final probability assessment. When strict adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the probability may be adjusted as appropriate based on professional judgment. Such decisions shall be adequately documented in the case file.

f. **Gravity-Based Penalty.** The gravity-based penalty (GBP) is an unadjusted penalty and is calculated in accordance with the following procedures:

(1) The GBP for each violation shall be determined based on an appropriate and balanced professional judgment combining the severity assessment and the final probability assessment.

(2) For serious violations, the GBP shall be assigned on the basis of the following scale:

Severity	Probability	GBP	Gravity
High	Greater	\$7,000	high (\$5,000+)
Medium	Greater	\$3,500----	
Low	Greater	\$2,500	-- moderate
High	Lesser	\$2,500	
Medium	Lesser	\$2,000----	
Low	Lesser	\$1,500	low

NOTE: The gravity of a violation is defined by the GBP.

- o A **high gravity** violation is one with a GBP of \$7,000 or greater.
- o A **moderate gravity** violation is one with GBP of \$2,000 to \$3,500.
- o A **low gravity** violation is one with a GBP of \$1,500.

(3) The highest gravity classification (high severity and greater probability) shall normally be reserved for the most serious violative conditions, such as those situations involving danger of death or extremely serious injury or illness. If the Chief determines that it is appropriate to achieve the necessary deterrent effect, a GBP of \$7,000 may be proposed. The reasons for this determination shall be documented in the case file.

(4) For other-than-serious safety and health violations, there is no severity assessment.

(5) The Chief may authorize a penalty between \$1,000 and \$7,000 for an **other-than-serious** violation when it is determined to be appropriate to achieve the necessary deterrent effect. The reasons for such a determination shall be documented in the case file.

Probability	GBP
Greater	\$1,000 - \$7,000
Lesser	\$0

(6) A GBP may be assigned in some cases without using the severity and the probability assessment procedures outlined in this section when these procedures cannot appropriately be used.

(7) The Penalty Table (Table IV-1) may be used for determining appropriate adjusted penalties for serious and other-than-serious violations.

g. Gravity Calculations for Combined or Grouped Violations. Combined or grouped violations will normally be considered as one violation and shall be assessed one GBP. The following procedures apply to the calculation of penalties for combined and grouped violations:

(1) The severity and the probability assessments for combined violations shall be based on the instance with the highest gravity. It is not necessary to complete the penalty calculations for each instance or subitem of a combined or grouped violation if it is clear which instance will have the highest gravity.

(2) For grouped violations, the following special guidelines shall be adhered to:

(a) **Severity Assessment.** There are two considerations to be kept in mind in calculating the severity of grouped violations:

1 The severity assigned to the grouped violation shall be no less than the severity of the most serious reasonably predictable injury or illness that could result from the violation of any single item.

2 If a more serious injury or illness is reasonably predictable from the grouped items than from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor of the grouped violation.

(b) **Probability Assessment.** There are two considerations to be kept in mind in calculating the probability of grouped violations:

1 The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness.

2 If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment of the grouped violation.

h. Penalty Adjustment Factors. The GBP may be reduced by as much as 95 per cent depending upon the employer's "good faith," "size of business," and "history of previous violations." Up to 60-percent reduction is permitted for size; up to 25-percent reduction for good faith, and 10-percent for history.

(1) Since these adjustment factors are based on the general character of a business and its safety and health performance, the factors generally shall be calculated only once for each employer. After the classification and probability ratings have been determined for each violation, the adjustment factors shall be applied subject to the limitations indicated in the following paragraphs.

(2) Penalties assessed for violations that are classified as high severity and greater probability shall be adjusted only for size and history.

(3) Penalties assessed for violations that are classified as repeated shall be adjusted only for size.

(4) Penalties assessed for regulatory violations, which are classified as willful, shall be adjusted for size. Penalties assessed for serious violations, which are classified as willful, shall be adjusted for size and history.

NOTE: If one violation is classified as willful, no reduction for good faith can be applied to any of the violations found during the same inspection. The employer cannot be willfully in violation of the Act and at the same time, be acting in good faith.

(5) The rate of penalty reduction for size of business, employer's good faith and employer's history of previous violations shall be calculated on the basis of the criteria described in the following paragraphs:

(a) **Size.** A maximum penalty reduction of 60 percent is permitted for small businesses. "Size of business" shall be measured on the basis of the maximum number of employees of an employer at all workplaces at any one time during the previous 12 months.

1 The rates of reduction to be applied are as follows:

Employees	Percent reduction
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1-25	60
26-100	40
101-250	20
251 or more	None

2 When a small business (1-25 employees) has one or more serious violations of high gravity or a number of serious violations of moderate gravity, indicating a lack of concern for employee safety and health, the CSHO may recommend that only a partial reduction in penalty shall be permitted for size of business.

(b) **Good Faith.** A penalty reduction of up to 25 percent, based on the CSHO's professional judgment, is permitted in recognition of an employer's "good faith".

1 The 25% credit for "good faith" normally requires a written safety and health program. In exceptional cases, the compliance officer may recommend the full 25% for a smaller employer (1-25 employees) who has implemented an efficient safety and health program, but has not reduced it to writing.

a Provides for appropriate management commitment and employee involvement; worksite analysis for the purpose of hazard identification; hazard prevention and control measures; and safety and health training.

NOTE: One example of a framework for such a program is given in OSHA's voluntary "Safety and Health Program Management Guidelines" (**Federal Register**, Vol. 54, No. 16, January 26, 1989, pp. 3904-3916, or later revisions as published).

b Has deficiencies that are only incidental.

2 A reduction of 15 percent shall normally be given if the employer has a documentable and effective safety and health program, but with more than only incidental deficiencies.

3 No reduction shall be given to an employer who has no safety and health program or where a willful violation is found.

4 Only these percentages (15% or 25%) may be used to reduce penalties due to the employer's good faith. No intermediate percentages shall be used.

5 Where young workers (i.e., less than 18 years old are employed, the COSHO's evaluation must consider whether the employer's safety and health program appropriately addresses the particular needs of such workers with regard to the types of work they perform and the hazards to which they are exposed.

(c) **History.** A reduction of 10 percent shall be given to employers who have not been cited by PEOSH for any serious, willful, or repeated violations in the past three years.

(d) **Total.** The total reduction will normally be the sum of the reductions for each adjustment factors.

(e) **Final penalty to be reduced by 90%.**

i. **Effect on Penalties If Employer Immediately Corrects or Initiates Corrective Action.** Appropriate penalties will be proposed with respect to an alleged violation even though, after being informed of such alleged violation by the CSHO, the employer immediately corrects or initiates steps to correct the hazard.

j. **Failure to Abate.** A Notification of Failure to Abate an Alleged Violation (PEOSH-2B) shall be issued in cases where violations have not been corrected as required.

(1) **Failure to Abate.** Failure to abate penalties shall be applied when an employer has not corrected a previously cited violation which had become a final order of the Commissioner.

(2) **Calculation of Additional Penalties.** A GBP for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon reinspection. This recalculated GBP, however, shall not be less than that proposed for the item when originally cited, except as provided in C.2.k.(4), below.

(a) In those instances where no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the Assistant Chief. In no case shall the unadjusted penalty be less than \$1,000 per day.

(b) Only the adjustment factor for size—based upon the circumstances noted during the reinspection—shall then be applied to arrive at the daily proposed penalty.

© The daily proposed penalty shall be multiplied by the number of calendar days that the violation has continued unabated, except as provided below:

1 The number of days unabated shall be counted from the day following the abatement date specified in the citation or the final order. It will include all calendar days between that date and the date of reinspection, excluding the date of reinspection.

2 Normally the maximum total proposed penalty for failure to abate a particular violation shall not exceed 30 times the amount of the daily proposed penalty.

3 At the discretion of the Chief, a lesser penalty may be proposed with the reasons for doing so (e.g., achievement of an appropriate deterrent effect) documented in the case file.

4 If a penalty in excess of the normal maximum amount of 30 times the amount of the daily proposed penalty is deemed appropriate by the Chief, the case shall be treated under the violation-by-violation (egregious) penalty procedures established in OSHA Instruction CPL 2.80.

(3) Partial Abatement.

(a) When the citation has been partially abated, the Chief may authorize a reduction of 25 percent to 75 percent to the amount of the proposed penalty calculated as outlined in C.2.k.(2), above.

(b) When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional daily proposed penalty shall take into consideration the extent that the violation has been abated.

EXAMPLE: Where 3 out of 5 instances have been corrected, the daily proposed penalty (calculated as outlined in C.2.k.(2), above, without regard to any partial abatement) may be reduced by 60 per cent.

(4) **Good Faith Effort to Abate.** When the CSHO believes, and so documents in the case file, that the employer has made a good faith effort to correct the violation and had good reason to believe that it was fully abated, the Assistant Director may reduce or eliminate the daily proposed penalty that would otherwise be justified.

k. **Repeated Violations.** N.J.S.A. 34:6A-41(d) of the Act provides that an employer who repeatedly violates the Act may be assessed a civil penalty of not more than \$70,000 for each violation.

(1) **Gravity-Based Penalty Factors.** Each violation shall be classified as serious or other-than-serious. A GBP shall then be calculated for repeated violations based on facts noted during the current inspection. Only the adjustment factor for size, appropriate to the facts at the time of the reinspection, shall be applied.

(2) **Penalty Increase Factors.** The amount of the increased penalty to be assessed for a repeated violation shall be determined by the size of the employer.

(a) **Smaller Employers.** For employers with 250 or fewer employees, the GBP shall be doubled for the first repeated violation and quintupled if the violation has been cited twice before. If the Chief determines that it is appropriate to achieve the necessary deterrent effect, the GBP may be multiplied by **10**.

(b) **Larger Employers.** For employers with more than 250 employees, the GBP shall be multiplied by **5** for the first repeated violation and multiplied by **10** for the second repeated violation.

(3) **Other-Than-Serious, No Initial Penalty.** For a repeated other-than-serious violation that otherwise would have no initial penalty, a GBP penalty of \$200 shall be assessed for the first repeated violation, \$500 if the violation has been cited twice before, and \$1,000 for a third repetition.

NOTE: This penalty will not have the penalty increase factors applied as discussed under C.2.l.(2).

(4) **Regulatory Violations.** For repeated instances of regulatory violations, the initial penalty shall be doubled for the first repeated violation and quintupled if the violation has been cited twice before. If the Chief determines that it is appropriate to achieve the necessary deterrent effect, the initial penalty r **IV-11** ed by **10**.

NOTE: See Chapter III, C.2.f., for additional guidance on citing repeated violations.

I. **Willful Violations.** N.J.S.A. 34:6A-41(d) of the Act provides that an employer who willfully violates the Act may be assessed a civil penalty of not more than \$70,000 but not less than \$5,000 for each violation.

(1) **Gravity-Based Penalty Factors.** Each willful violation shall be classified as serious or other-than-serious.

(a) **Serious Violations.** For willful serious violations, a gravity of **high**, **moderate**, or **low** shall be assigned based on the GBP of the underlying serious violation, as described at C.2.g.(2).

1 The adjustment factor for size shall be applied as shown

In the following chart:

Employees	Percent Reduction
10 or less	80
11 – 20	60
21 – 30	50
31 – 40	40
41 – 50	30
51 – 100	20
101 – 250	10
251 or more	0

2 The adjustment factor for history shall be applied as described at C.2.i.(5)c; i.e., a reduction of 10 percent shall be given to employers who have not been cited by PEOSH for any serious, willful, or repeated violations in the past 3 years. There shall be no adjustment for good faith.

3 The proposed penalty shall then be determined from the table below:

Penalties to Proposed be			
Total percentage reduction for size and/or history	High Gravity	Moderate Gravity	Low Gravity
0%	\$70,000	\$55,000	\$40,000
10%	\$63,000	\$49,500	\$36,000
20%	\$56,000	\$44,000	\$32,000
30%	\$49,000	\$38,500	\$28,000
40%	\$42,000	\$33,000	\$24,000
50%	\$35,000	\$27,500	\$20,000
60%	\$28,000	\$22,000	\$16,000
70%	\$21,000	\$16,500	\$12,000
80%	\$14,000	\$11,000	\$8,000
90%	\$7,000	\$5,500	\$5,000

4 In no case shall the proposed penalty be less than \$5,000.

(b) **Other-Than-Serious Violations.** For willful other-than-serious violations, the minimum willful penalty of \$5,000 shall be assessed.

(2) **Regulatory Violations.** In the case of regulatory violations (see C.2.n., below) that are determined to be willful, the unadjusted initial penalty shall be multiplied by **10**. In no event shall the penalty, after adjustment for size, be less than \$5,000.

m. **Violation of 29 CFR Parts 1903 and 1904 Regulatory Requirements.** Except as provided in the Appropriations Act, Section 17 of the Act provides that an employer who violates any of the posting requirements shall be assessed a civil penalty of up to \$7,000 for each violation and may be assessed a like penalty for recordkeeping violations.

(1) **General Application.** Unadjusted penalties for regulatory violations, including posting requirements, shall have the adjustment factors for size and history applied (excluding willful violations, see C.2.m.(2), above).

(2) **Posting Requirements.** Penalties for violation of posting requirements shall be proposed as follows:

(a) **PEOSH Notice (Poster).** If the employer has not displayed (posted) the notice furnished by the Office of Public Employees Occupational Safety and Health as prescribed in 29 CFR 1903.2 (a), an other-than-serious citation shall normally be issued. The unadjusted penalty for this alleged violation shall be \$1,000 provided that the employer has received a copy of the poster or had knowledge of the requirement.

(b) **Annual Summary.** If an employer fails to post the summary portion of the PEOSH-300 Form during the months of February through March as required by 29 CFR 1904.5(d)(1), and/or fails to complete the summary prior to February 1, as required by 29 CFR 1904.5(b), even if there have been no injuries, an other-than-serious citation shall be issued. The unadjusted penalty for this violation shall be \$1,000.

(c) **Citation.** If an employer received a citation that has not been posted as prescribed in 29 CFR 1903.16, an other-than-serious citation shall normally be issued. The unadjusted penalty shall be \$3,000.

(3) **Reporting and Recordkeeping Requirements.** The Act provides that violations of the recordkeeping and reporting requirements may be assessed civil penalties of up to \$7,000 for each violation.

(a) **PEOSH-300 Form.** If the employer does not maintain the Log and Summary of Occupational Injuries and Illnesses, PEOSH-300 Form, as prescribed in 29 CFR Part 1904, an other-than-serious citation shall be issued. There shall be an unadjusted penalty of \$1,000 for each year the form was not maintained, for each of the preceding 3 years.

1 When no recordable injuries or illnesses have occurred at a workplace during the current calendar year, the PEOSH 300 need not be completed until the end of the calendar year for certification of the summary.

2 An PEOSH-300 with significant deficiencies shall be considered as not maintained.

(b) **PEOSH-301 Forms.** If the employer does not maintain the Supplementary Record, PEOSH 301 Form (or equivalent), as prescribed in N.J.A.C. 12:110-5.4, an other-than-

serious citation shall be issued. There shall be an unadjusted penalty of \$1000 for each PEOSH-101 Form not maintained.

1 A penalty of \$1000 for each PEOSH-301 Form not maintained at all up to a maximum of \$7000.

2 A penalty of \$1,000 for each PEOSH-301 Form inaccurately maintained up to a maximum of \$3000.

3 Minor inaccuracies shall be cited, but with no penalties.

4 If large numbers of violations or other circumstances indicate that the violations are willful, then other penalties including, violation-by-violation, may be applied.

(c) **Reporting.** Employers are required to report either orally or in writing to the nearest Area Office within 8 hours, any occurrence of an employment accident which is fatal to one or more employees or which results in the hospitalization of three or more employees.

1 An other-than-serious citation shall be issued for failure to report such an occurrence. The unadjusted penalty shall be \$5,000.

2 If the Chief determines that it is appropriate to achieve the necessary deterrent effect, an unadjusted penalty of \$7,000 may be assessed.

3 If the Chief becomes aware of an incident required to be reported under N.J.A.C. 12:110-5.1 through some means other than an employer report, prior to the elapse of the 8-hour reporting period and an inspection of the incident is made, a citable violation for failure to report does not exist.

(4) **Grouping.** Violations of the posting and recordkeeping requirements which involve the same document (e.g., summary portion of the PEOSH-300 Form was neither posted nor maintained) shall be grouped as an other-than-serious violation for penalty purposes. The unadjusted penalty for the grouped violations would then take on the highest dollar value of the individual items, which will normally be \$1,000.

(5) **Access to Records.**

(a) **N.J.A.C. 12:110-5.7.** If the employer fails upon request to provide records required for inspection and copying by any employee, former employee, or authorized representative of employees, a citation for violation of N.J.A.C. 12:110-5.7 shall normally be issued. The unadjusted penalty shall be \$1,000 for each form not made available.

1 Thus, if the PEOSH-300 for the 3 preceding years is not made available, the unadjusted penalty would be \$3,000.

2 If the employer is to be cited for failure to maintain these records, no citation of N.J.A.C. 12:110-5.7 shall be issued.

(b) **29 CFR 1910.1020.** If the employer is cited for failing to provide records as required under 29 CFR 1910.1020 for inspection and copying by any employee, former employee, or authorized representative of employees, an unadjusted penalty of \$1,000 shall be proposed for each record; i.e., either medical record or exposure record, on an individual employee basis. A maximum \$7,000 may be assessed for such violations. This policy does not preclude the use of violation-by-violation penalties where appropriate.

EXAMPLE: If all the necessary evidence is established where an authorized employee representative requested exposure and medical records for 3 employees and the request was denied by the employer, a citation would be issued for 6 instances of violation of 29 CFR 1910.1020, with an unadjusted penalty of \$6,000.

(6) **Notification Requirements.** When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by 29 CFR 1903.6, an other-than-serious citation shall be issued. The violation shall have an unadjusted penalty of \$2,000.

Table IV – 1

PENALTY TABLE

Percent Reduction	PENALTY (in dollars)							
0	1,000	1,500	2,000	2,500	3,000	3,500	5,000	7,000
10	900	1,350	1,800	2,250	2,700	3,150	4,500	6,300
15	850	1,275	1,700	2,125	2,550	2,975	4,250*	5,950*
20	800	1,200	1,600	2,000	2,400	2,800	4,000	5,600
25	750	1,125	1,500	1,875	2,225	2,625	3,750*	5,250*
30	700	1,050	1,400	1,750	2,100	2,450	3,500	4,900
35	650	975	1,300	1,625	1,950	2,275	3,250*	4,550*
40	600	900	1,200	1,500	1,800	2,100	3,000	4,200
45	550	825	1,100	1,375	1,650	1,925	2,750*	3,850*
50	500	750	1,000	1,250	1,500	1,750	2,500	3,500
55	450	675	900	1,125	1,350	1,575	2,250*	3,150*
60	400	600	800	1,000	1,200	1,400	2,000	2,800
65	350	525	700	875	1,050	1,225	1,750*	2,450*
70	300	450	600	750	900	1,050	1,500	2,100
75	250	375	500	625	750	875	1,250*	1,750*
85	150	225	300	375	450	525	750*	1,050*
95	100**	100**	100	125	150	175	250*	350*

* Starred figures represent penalty amounts that would not normally be proposed for high gravity serious violations because no adjustment for good faith is made in such cases. They may occasionally be applicable for other – than – serious violations where the Assistant Director has determined a high unadjusted penalty amount to be warranted.

** Administratively, PEOSH will not issue a penalty less than \$100 for a serious violation.

NOTE: All penalties as determined by the federal method will be adjusted by the imposing of a ninety percent reduction.

(adjusted Federal determined penalty) 0.1 = state imposed penalty.

C. 3. Criminal Penalties.

a. The Act and the U.S. Code provide for criminal penalties in the following cases:

(1) Willful violation of a PEOSH standard, rule, or order causing the death of an employee (Section 17(e)).

(2) Giving unauthorized advance notice. (Section 17(f).)

(3) Giving false information. (Section 17(g).)

(4) Killing, assaulting or hampering the work of a CSHO. (Section 17(h)(2).)

b. Criminal penalties are imposed by the courts after trials and not by the Office of Public Employees Occupational Safety and Health or the Occupational Safety and Health Review Commission.

D. Post-Citation Processes.

1. Informal Conferences.

a. **General.** Pursuant to N.J.A.C. 12:110-4.13, the employer, any affected employee or the employee representative may request an informal conference. When an informal conference is conducted, it shall be conducted within the 15 working day contest period. If the employer's intent to contest is not clear, the Assistant Director shall contact the employer for clarification.

b. **Procedures.** Whenever an informal conference is requested by the employer, an affected employee or the employee representative, both parties shall be afforded the opportunity to participate fully. If either party chooses not to participate in the informal conference, a reasonable attempt shall be made to contact that party to solicit their input prior to signing an informal settlement agreement if the adjustments involves more than the penalty. If the requesting party objects to the attendance of the other party, separate informal conferences may be held. During the conduct of a joint informal conference, separate or private discussions shall be permitted if either party so requests. Informal conferences may be held by any means practical.

(1) The employer shall be requested to complete and post the form found at the end of the informal conference letter until after the informal conference has been held.

(2) Documentation of the Chief's actions notifying the parties of the informal conference shall be placed in the case file.

c. **Participation by PEOSH Officials.** The inspecting CSHOs and their Assistant Chiefs shall be notified of an upcoming informal conference and, if practicable, given the opportunity to participate in the informal conference (unless, in the case of the CSHO, the Chief anticipates that only a penalty adjustment will result).

(1) At the discretion of the Chief, one or more additional PEOSH employees (in addition to the Chief) may be present at the informal conference. In cases in which proposed penalties total \$100,000 or more, a second PEOSH staff member shall attend the informal conference.

(2) The Chief shall ensure that notes are made indicating the basis for any decisions taken at or as a result of the informal conference. It is appropriate to tape record the informal conference and to use the tape recording in lieu of written notes.

d. **Conduct of the Informal Conference.** The Assistant Director shall conduct the informal conference in accordance with the following guidelines:

(1) **Opening Remarks.** The opening remarks shall include discussions of the following:

- (a) Purpose of the informal conference.
- (b) Rights of participants.
- (c) Contest rights and time restraints.
- (d) limitations, if any.
- (e) Settlements of cases.
- (f) Other relevant information.
- (g) If the Chief states any views on the legal merits of the employer's contentions, it should be made clear that those views are personal opinions only.

(2) **Closing.** At the conclusion of the discussion the main issues and potential courses of action shall be summarized. A copy of the summary, together with any other relevant notes or tapes of the discussion made by the Assistant Director, shall be placed in the case file.

e. **Decisions.** At the end of the informal conference, the Chief shall make a decision as to what action is appropriate in the light of facts brought up during the conference.

(1) Changes to citations, penalties or abatement dates normally shall be made by means of an informal settlement agreement in accordance with current PEOSH procedures; the reasons for such changes shall be documented in the case file. For more detail on settlement agreements, see D.4.b., below.

(2) Employers shall be informed that they are required to post copies of all amendments to the citation resulting from informal conferences. Employee representatives must also be provided with copies of such documents. This regulation covers amended citations, citation withdrawals and settlement agreements.

f. **Failure to Abate.** If the informal conference involves an alleged failure to abate, the Chief shall set a new abatement date in the informal settlement agreement, documenting for the case file the time that has passed since the original citation, the steps that the employer has taken to inform the exposed employees of their risk and to protect them from the hazard, and the measures that will have to be taken to correct the condition.

2. **Petitions for Modification of Abatement Date (PMA).** Title 29 CFR 1903.14a governs the disposition of PMAs. If the employer requests additional abatement time after the 15-working-day contest period has passed, the following procedures for PMAs are to be observed:

a. **Filing Date.** A PMA must be filed in writing with the Chief who issued the citation no later than the close of the next working day following the date on which abatement was originally required.

(1) If a PMA is submitted orally, the employer shall be informed that PEOSH cannot accept an oral PMA and that a written petition must be mailed by the end of the next working day after the abatement date. If there is not sufficient time to file a written petition, the employer shall be informed of the requirements below for late filing of the petition.

(2) A late petition may be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.

b. **Failure to Meet All Requirements.** If the employer's letter does not meet all the requirements of 1903.14a(b)(1)-(5), the employer shall be contacted within 10 working days and notified of the missing elements. A reasonable amount of time for the employer to respond shall be specified during this contact with the employer.

(1) If no response is received or if the information returned is still insufficient, a second attempt (by telephone or in writing) shall be made. The employer shall be informed of the consequences of a failure to respond adequately; namely, that the PMA will not be granted and the employer may, consequently, be found in failure to abate.

(2) If the employer responds satisfactorily by telephone and the Chief determines that the requirements for a PMA have been met, appropriate documentation shall be placed in the case file.

c. **Delayed Decisions.** Although PEOSH policy is to handle PMAs as expeditiously as possible, there are cases where the Chief's decision on the PMA is delayed because of deficiencies in the PMA itself, a decision to conduct a monitoring inspection. Requests for additional time (e.g., 45 days) for the Chief to formulate a position shall be sent to the Review Commission through the Assigned Deputy Attorney General. A letter conveying this request shall be sent at the same time to the employer and the employee representatives.

d. **PEOSH Position on the PMA.** After 15 working days following the PMA posting, the Chief shall determine the PEOSH position, agreeing with or objecting to the request. This shall be done within 10 working days following the 15 working days (if additional time has not been requested from the Review Commission; in the absence of a timely objection, the PMA is automatically granted even if not explicitly approved). The following action shall be taken:

(1) If the PMA requests an abatement date which is two years or less from the issuance date of the citation, the Chief has the authority to approve or object to the petition.

(2) Any PMA requesting an abatement date which is more than two years from the issuance date of the citation requires the approval of the Assistant Director as well as the Assistant Director.

(3) If the PMA is approved, the Chief shall notify the employer and the employee representatives by letter.

(4) If supporting evidence justifies it (e.g., employer has taken no meaningful abatement action at all or has otherwise exhibited bad faith), the Chief or the Regional Administrator, as appropriate and after consultation with the Assigned Deputy Attorney General, shall object to the PMA. In such a case, all relevant documentation shall be sent to the Review Commission in accordance with 29 CFR 1903.14a(d). Both the employer and the employee representatives shall be notified of this action by letter, with return receipt requested.

(a) The letters of notification of the objection shall be mailed on the same date that the agency objection to the PMA is sent to the Review Commission.

(b) When appropriate, after consultation with the Assigned Deputy Attorney General, a failure to abate notification may be issued in conjunction with the objection to the PMA.

e. **Employee Objections.** Affected employees or their representatives may file an objection in writing to an employer's PMA with the Chief within 10 working days of the date of posting of the PMA by the employer or its service upon an authorized employee representative.

(1) Failure to file such a written objection with the 10-working-day period constitutes a waiver of any further right to object to the PMA.

(2) If an employee or an employee representative objects to the extension of the abatement date, all relevant documentation shall be sent to the Review Commission.

(a) Confirmation of this action shall be mailed (return receipt requested) to the objecting party as soon as it is accomplished.

(b) Notification of the employee objection shall be mailed (return receipt requested) to the employer on the same day that the case file is forwarded to the Commission.

3. Services Available to Employers. Employers requesting abatement assistance shall be informed that PEOSH is willing to work with them even after citations have been issued.

4. Settlement of Cases By Chiefs.

a. **General.** Chiefs are granted settlement authority, using the following policy guidelines to negotiate settlement agreements.

(1) Except for egregious cases, Chiefs are authorized to enter into Informal Settlement Agreements with an employer before the employer files a written notice of contest.

NOTE: After the employer has filed a written notice of contest, the Chief may proceed toward a Formal Settlement Agreement with the concurrence of the Assigned Deputy Attorney General in cases where a settlement appears probable without the need for active participation by an attorney.

(2) Chiefs are authorized to change abatement dates, to reclassify violations (e.g., willful to serious, serious to other-than-serious), and to modify or withdraw a penalty, a citation or a citation item if the employer presents evidence during the informal conference which convinces the Chief that the changes are justified.

(a) If an employer, having been cited as willfully or repeatedly violating the Act, decides to correct all violations, but wishes to purge himself or herself of the adverse public perception attached to a willful or repeated violation classification and is willing to pay all or almost all of the penalty and is willing to make significant additional concessions, then a Section 17 designation may be applicable. Decisions to make a Section 17 designation shall be based on whether the employer is willing to make significant concessions.

NOTE: Significant concessions may include the company entering into a corporate-wide settlement agreement providing employee training of a specified type and frequency, hiring a qualified safety and health consultant and implementing the recommendations, effecting a comprehensive safety and health program, reporting new construction jobs or other worksites to PEOSH, or waiving warrants for specified inspections/periods.

(b) A Section 17 designation also may be considered if the employer has advanced substantial reasons why the original classification is questionable but is willing to pay the penalty as proposed.

NOTE: Where the original classification clearly was excessive, Section 17 is not appropriate. Instead, the citation shall be amended to the appropriate classification.

(3) The Chief has authority to actively negotiate the amount of penalty reduction, depending on the circumstances of the case and what improvements in employee safety and health can be obtained in return.

(4) Employers shall be informed that they are required by 29 CFR 1903.19 to post copies of all amendments or changes resulting from informal conferences. Employee representatives must also be provided with copies of such documents. This regulation covers amended citations, citation withdrawals and settlement agreements.

b. Pre-Contest Settlement (Informal Settlement Agreement). Pre-contest settlements generally will occur during, or immediately following, the informal conference and prior to the completion of the 15 working day contest period.

(1) If a settlement is reached during the informal conference, an Informal Settlement Agreement shall be prepared and the employer representative shall be invited to sign it. The Informal Settlement Agreement shall be effective upon signature by both the Chief and the employer representative so long as the contest period has not expired. Both shall date the document as of the day of actual signature.

(a) If the employer representative requests more time to consider the agreement and if there is sufficient time remaining of the 15-working-day period, the Chief shall sign and date the agreement and provide the signed original for the employer to study while considering whether to sign it. A letter explaining the conditions under which the agreement will become effective shall be given (or mailed by certified mail, return receipt requested) to the employer and a record kept in the case file.

(b) The Chief shall sign and date the agreement and provide the original (in person, or by certified mail, return receipt requested) to the employer if any other circumstances warrant such action; the agreement may also be sent to the employer for signature, and returned to the Assistant Director, via facsimile if circumstances warrant.

1 If the signed agreement is provided to the employer, a copy shall be kept in the case file and the employer informed in writing that no changes are to be made to the original by the employer without explicit prior authorization for such changes from the Chief.

2 In every case the Chief shall give formal notice in writing to the employer that the citation will become final and unreviewable at the end of the contest period unless the employer either signs the agreement or files a written notice of contest.

3 If the employer representative wishes to make any changes to the text of the agreement, the Chief must agree to and authorize the proposed changes prior to the expiration of the contest period.

a If the changes proposed by the employer are acceptable to the Assistant Director, they shall be authorized and the exact language to be written into the agreement shall be worked out mutually. The employer shall be instructed to incorporate the agreed-upon language into the agreement, sign it and return it to the Office of Public Employees Occupational Safety and Health as soon as practicable by telefacsimile, if possible.

b Annotations incorporating the exact language of any changes authorized by the Chief shall be made to the retained copy of the agreement, and a dated record of the authorization shall be signed by the Chief and placed in the case file.

4 Upon receipt of the Informal Settlement Agreement signed by the employer, the Chief shall ensure that any modified text of the agreement is in accordance with the notations made in the case file.

a If so, the citation record shall be updated in IMIS in accordance with current procedures.

b If not, and if the variations substantially change the terms of the agreement, the agreement signed by the employer shall be considered as a notice of intent to contest and handled accordingly. The employer shall be so informed as soon as possible.

5 A reasonable time shall be allowed for return of the agreement from the employer.

a After that time, if the agreement has still not been received, the Assistant Director shall presume that the employer is not going to sign the agreement; and the citation shall be treated as a final order until such time as the agreement is received, properly signed prior to the expiration of the contest period.

b The employer shall be required to certify that the informal settlement agreement was signed prior to the expiration of the contest period.

(2) If the Chief's settlement efforts are unsuccessful and the employer contests the citation, the Chief shall state the terms of the final settlement offer in the case file.

c. Procedures for Preparing the Informal Settlement Agreement. The Informal Settlement Agreement shall be prepared and processed in accordance with current PEOSH policies and practices.

d. Post-Contest Settlement (Formal Settlement Agreement). Post-contest settlements will generally occur before the complaint is filed with the Review Commission.

(1) Following the filing of a notice of contest, the Chief shall, unless other procedures have been agreed upon, notify the Assigned Deputy Attorney General when it appears that negotiations with the employer may produce a settlement. This shall normally be done at the time when the notice of contest transmittal memorandum is sent to the Assigned Deputy Attorney General.

(2) If a settlement is later requested by the employer with the Chief, the Assistant Director shall communicate the terms of the settlement to the Assigned Deputy Attorney General who will then draft the settlement agreement.

5. Guidance for Determining Final Dates of Settlements and Review Commission Orders.

a. Citation/Notice of Penalty Not Contested. The Citation/Notice of Penalty and abatement date becomes a final order of the Commission on the date the 15-working-day contest period expires.

b. Citation/Notice of Penalty Resolved by Informal Settlement Agreement (ISA). The ISA becomes final, with penalties due and payable, 15 working days after the date of the last signature.

NOTE: A later due date for payment of penalties may be set by the terms of the ISA.

NOTE: The Review Commission does NOT review the ISA.

c. Citation/Notice of Penalty Resolved by Formal Settlement Agreement (FSA). The Citation/Notice of Penalty becomes final 30 days after docketing of the Administrative Law Judge's (ALJ's) **Order** "approving" the parties' stipulation and settlement agreement, assuming there is no direction for review. The Commission's **Notice of Docketing** specifies the date upon which the decision becomes a final order. If the FSA is "approved" by a Commission's **Order**, it will become final after 60 days.

NOTE: A later due date for payment of penalties may be set by the terms of the FSA.

NOTE: Settlement is permitted and encouraged by the Commission at any stage of the proceedings.

d. **Citation/Notice of Penalty Resolved by an ALJ Decision.** The ALJ decision/report becomes a final order of the Commission 30 days after docketing unless the Commission directs a review of the case. The Commission's **Notice of Docketing** specifies the date upon which the decision becomes a final order.

e. **ALJ Decision is Reviewed by Commission.** According to Section 11 of the OSH Act, the Commission decision becomes final 60 days after the **Notice of Commission Decision** if no appeal has been filed with the N.J. Court of Appeals. The **Notice of Commission Decision** specifies the date the Commission decision is issued.

f. **Commission Decision Reviewed by the N.J. Court of Appeals.** The N.J. Court of Appeals' decision becomes final 90 days after the entry of the judgment, if no appeal has been filed with then.J. Supreme Court.

E. Review Commission.

1. Transmittal of Notice of Contest and Other Documents to Commission.

a. **Notice of Contest.** In accordance with the Occupational Safety and Health Review Commission (PEOSHRC) revised Rules of Procedure (51 F.R. 32020, No. 173, September 8, 1986), the original notice of contest, together with copies of all relevant documents (all contested Citations and Notifications of Penalty and Notifications of Failure to Abate Alleged Violation, and proposed additional penalty) shall be transmitted by the Chief to the OSHRC postmarked prior to the expiration of 15 working days after receipt of the notice of contest (29 CFR 2200.33). The assigned Deputy Attorney General shall be consulted in questionable cases.

E. 1. a. (1) The envelope that contained the notice of contest shall be retained in the case file with the postmark intact.

(2) Where the Chief is certain that the notice of contest was not mailed; i.e., postmarked, within the 15-working-day period allowed for contest, the notice of contest shall be returned to the employer who shall be advised of the statutory time limitation. The employer shall be informed that PEOSHRC has no jurisdiction to hear the case because the notice of contest was not filed within the 15 working days allowed and, therefore, that the notice of contest will not be forwarded to the PEOSHRC. A copy of all untimely notices of contest shall be retained in the case file.

(3) If the notice of contest is submitted to the Chief after the 15-working-day period, but the notice contests only the reasonableness of the abatement period, it shall be treated as a Petition for Modification of Abatement and handled in accordance with the instructions in D.2. of this chapter.

(4) If written communication is received from an employer containing objection, criticism or other adverse comment as to a citation or proposed penalty, which does not clearly appear to be a notice of contest, the Chief shall contact the employer as soon as possible to clarify the intent of the communication. Such clarification must be obtained within 15 working days after receipt of the communication so that if, in fact, it is a notice of contest, the file may be forwarded to the Review Commission within the allowed time. The Chief shall make a memorandum for the case file regarding the substance of this communication.

(5) If the Chief determines that the employer intends the document to be a notice of contest, it shall be transmitted to the PEOSHRC in accordance with E.1.a., above. If the employer did not intend the document to be a notice of contest, it shall be retained in the case file with the memorandum of the contact with the employer. If no contact can be made with the employer, communications of the kind referred to in E.1. a.(4), above, shall be timely transmitted to the OSHRC.

(6) If the Chief's contact with the employer reveals a desire for an informal conference, the employer shall be informed that an informal conference does not stay the running of the 15-working-day period for contest.

E. 1. b. **Documents to Executive Secretary.** The following documents are to be transmitted within the 15-working day time limit to the Occupational Safety and Health Review Commission.

NOTE: In order to give the assigned Deputy Attorney General the maximum amount of time to prepare the information needed in filing a complaint with the Review Commission, the notice of contest and other documents shall not be forwarded to the Review Commission until the final day of the 15-working-day period.

(1) **All Notices of Contest.** The originals are to be transmitted to the Commission and a copy of each retained in the case file.

(2) **All Contested Citations and Notices of Proposed Penalty or Notice of Failure to Abate Issued in the Case.** The signed copy of each of these documents shall be taken from the case file and sent to the Commission after a copy of each is made and placed in the case file.

(3) **Certification Form.** The certification form shall be used for all contested cases and a copy retained in the case file. It is essential that the original of the certification form, properly executed, be transmitted to the Commission.

(4) **Documents Sent to OSHRC.** In most cases, the envelope sent to the PEOSHRC will contain only four documents—the certification form, the employer's letter contesting PEOSH's action, and a copy of the Citation and Notification of Penalty Form (OSHA-2) or of the Notice of Failure to Abate Form (OSHA-2B).

c. Petitions for Modification of Abatement Dates (PMAs).

(1) In accordance with the PEOSHRC Rules of Procedure the Secretary or duly authorized agent shall have the authority to approve petitions for modification of abatement filed pursuant to 29 CFR 2200.37(b) and (c).

(2) The purpose of this transfer of responsibility is to facilitate the handling and to expedite the processing of PMAs to which neither the Secretary nor any other affected party objects. The Chief who issued the citation is the authorized agent of the Secretary and shall receive, process, approve, disapprove or otherwise administer the petitions in accordance with 29 CFR 2200.37 and 2200.38, 29 CFR 1903.14a, and D.2. of this chapter. In general, the Chief shall:

(a) Ensure that the formal requirements of 2200.37(b) and (c) and 1903.14a are met.

(b) Approve or disapprove uncontested PMA's within 15 working days from the date the petition was posted where all affected employees could have notice of the petition.

(c) Forward to the Review Commission within 10 working days after the 15-working-day approval period all petitions objected to by the Chief or affected employees.

(d) File a response setting forth the reasons for opposing granting of the PMA within 10 working days after receipt of the docketing by the Commission.

E. 2. Transmittal of File to Assigned Deputy Attorney General.

a. **Notification of the Assigned Deputy Attorney General.** Under the Commission's Rules of Procedure the Commissioner of Labor is required to file a complaint with the Commission within 20 calendar days after the receipt of a notice of contest.

b. **Subpoena.** The Commission's rules provide that any person served with a subpoena, whether merely to testify in any Commission hearing or to produce records and testify in such hearing, shall, within 5 days after the serving of the subpoena, move to revoke the subpoena if the person does not intend to comply with the subpoena. These time limitations must be complied with, and expeditious handling of any subpoena served on PEOSH employees is necessary. In addition, PEOSH personnel may be subpoenaed to participate in nonthird-party PEOSH actions. In both types of cases, the Assigned Deputy Attorney General will move to revoke the subpoena on PEOSH personnel. Therefore, when any such subpoena is served on PEOSH personnel, the Assigned Deputy Attorney General shall immediately be notified by telephone.

3. **Communications with Commission Employees.** There shall be no ex parte communication, with respect to the merits of any case not concluded, between the Commission, including any member, officer, employee, or agent of the Commission who is employed in the decisional process, and any of the parties or interveners. Thus, CSHOs, Chiefs, Assistant Directors, or other field personnel shall refrain from any direct or indirect communication relevant to the merits of the case with Administrative Law Judges or any members or employees of the Commission. All inquiries and communications shall be handled through the Assigned Deputy Attorney General.

4. Dealings With Parties While Proceedings Are Pending Before the Commission.

a. **Clearance with Assigned Deputy Attorney General.** After the notice of contest is filed and the case is within the jurisdiction of the Commission, there shall be no investigations or conferences with the employer without clearance from the appropriate Assigned Deputy Attorney General. Such requests shall be referred promptly to the Assigned Deputy Attorney General for a determination of the advisability, scope and timing of any investigation, and the advisability of and participation in any conference. To the maximum extent possible, there shall be consultation with the Solicitor on questions of this nature so as to insure no procedural or legal improprieties.

E. 4. b. **Inquiries.** Once a notice of contest has been filed, all inquiries relating to the general subject matter of the Citation and Notification of Penalty raised by any of the parties of the proceedings, including the employer and affected employees or authorized employee representative, shall be referred promptly to the Assigned Deputy Attorney General. Similarly, all other inquiries, such as from prospective witnesses, insurance carriers, other Government agencies, attorneys, etc., shall be referred to the Assigned Deputy Attorney General.

**PUBLIC EMPLOYEES' OCCUPATIONAL SAFETY and HEALTH
(PEOSH)
FIELD INSPECTION REFERENCE MANUAL
(FIRM)**

CHAPTER V

PENALTIES

CHAPTER V – PENALTIES

I. General Penalty Policy.....	V-1
II. Civil Penalties.....	V-1
A. Statutory Authority.....	V-1
B. Appropriations Restrictions.....	V-2
C. Ceiling Penalties.....	V-2
Table 5-1: Ceiling Limits for Civil Penalties (Unadjusted).....	V-2
D. Minimum Penalties.....	V-2
E. Penalty Factors.....	V-3
F. Gravity of Violation.....	V-3
G. Severity Assessment.....	V-3
H. Probability Assessment.....	V-3
I. Gravity-Based Penalty.....	V-4
Table 5-2: Serious Violations.....	V-4
Table 5-3: Other-Than-Serious Violations.....	V-5
J. Gravity Calculations for Combined or Grouped Violations.....	V-5
K. Penalty Adjustment Factors.....	V-6
Table 5-4: Health & Safety Violations Penalty Adjustment Factors: Serious, Other-Than-Serious, and/or Repeated Violations.....	V-9
L. Effect on Penalties If Employer Immediately Corrects or Initiates Corrective Action.....	V-10
Table 5-5: Penalty Adjustment Factors Under the Immediate Abatement Program (Quick-Fix).....	V-11
Table 5-6: Penalty Adjustment Factors - Willful Violations.....	V-13
Table 5-7: Penalties to be Proposed for Willful Violations....	V-13
O. Violations of 29 CFR Parts 1903 and 1904 Regulatory Requirements.....	V-14
Table 5-8: Penalty Overview - 29 CFR Part 1904 Recordkeeping Violations.....	V-15
Table 5-9: Penalty Overview - 29 CFR Part 1904 Injury And Illness Posting Violations.....	V-16
Table 5-10: Penalty Overview - 29 CFR Part 1904 Reporting And Access Violations.....	V-17
P. Failure to Provide Access to Medical and Exposure Records 29 CFR 1910.102.....	V-18
Q. Advanced Notice of Inspection.....	V-18
Table 5-11: Penalty Table.....	V-19
Directives Referenced in Chapter 5 – Penalties.....	V-20

Chapter V PENALTIES

- I. General Penalty Policy. The penalty structure provided under Section 17 of the Act is designed primarily to provide an incentive toward correcting violations voluntarily, not only to the offending employer but, more especially, to other employers who may be guilty of the same infractions of the standards or regulations.
- A. While penalties are not designed primarily as punishment for violations, the Congress has made clear its intent that penalty amounts should be sufficient to serve as an effective deterrent to violations.
 - B. Large proposed penalties, therefore, serve the public purpose intended under the Act; and criteria guiding approval of such penalties by the Assistant Secretary are based on meeting this public purpose. (See **OSHA Instruction CPL 02-0-080**, Handling of Cases to be Proposed for Violation-By-Violation Penalties, dated October 21, 1990, or the most current version.)
 - C. The OSHA Act requires that due consideration be given to the appropriateness of the penalty with regard to the size of the business, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations.

The penalty structure outlined in this section is designed as a general guideline. The Area Director may deviate from this guideline if warranted, to achieve the appropriate deterrent effect. When in a particular case, the discretion allowed by the FIRM to deviate from the normal formula is exercised; the reasons for doing so must be fully explained in the case file.

II. Civil Penalties.

- A. Statutory Authority. Section 17 provides the Secretary with the statutory authority to propose civil penalties for violations of the Act. Proposed penalties are the penalty amounts issued with citation(s).
 - 1. Section 17(b) of the Act provides that any employer who has received a citation for an alleged violation of the Act which is determined to be of a serious nature shall be assessed a civil penalty of up to \$7,000 for each violation.
 - 2. Section 17(c) provides that, when the violation is specifically determined not to be of a serious nature, a proposed civil penalty of up to \$7,000 may be assessed for each violation.
 - 3. Section 17(i) provides that, when a violation of a posting requirement is cited, a civil penalty of up to \$7,000 shall be assessed. [See **OSHA Instruction CPL 02-00-111**, Citation Policy for Paperwork and Written Program Requirement Violations, issued November 27, 1995 and section I.B.16. of this chapter for detailed policy.]

B. Appropriations Restrictions.

OSHA's authority to propose penalty assessments with respect to establishments of small, low-hazard rate establishments that employ 10 or fewer employees has been limited by Congress through the appropriations process.

Refer to **OSHA Instruction 02-00-051**, Enforcement Exemptions and Limitations under the Appropriations Act initially issued on May 28, 1998 with a memo change dated January 23, 2004, or the most current version for detailed information about this important subject. C.

- C. Ceiling Penalties.** The civil penalty amounts included in Section 17 are generally ceiling amounts and do not include any permissible adjustments. 5-1 summarizes the ceiling limits for proposed penalties:

Table 5-1: Ceiling Limits for Civil Penalties (Unadjusted)

<i>Type of Violation</i>	<i>Penalty Ceiling</i>
Serious	\$7,000 per violation
Other-Than-Serious	\$7,000 per violation
Willful or Repeat	\$70,000 per violation
Posting Requirements	\$7,000 per violation
Failure to Abate	\$7,000 per day unabated beyond ¹ the abatement date

¹ Detailed instructions for failure to abate citations and penalties are included in Chapter xx Assurance of Abatement.

D. Minimum Penalties. The following guidelines apply:

1. The proposed penalty for any willful violation shall not be less than \$5,000. The \$5,000 penalty is a statutory minimum and not subject to administrative discretion. See I.B.15.(2), below, for applicability to small employers.
2. When the adjusted proposed penalty for an other-than-serious violation (citation item) would amount to less than \$100, no penalty shall be proposed for that violation.
3. When, however, there is a citation item for a posting violation, this minimum penalty amount does not apply with respect to that item since penalties for such items are mandatory under the Act.
4. When the adjusted proposed penalty for a serious violation (citation item) would amount to less than \$100, a \$100 penalty shall be proposed for that violation.

E. Penalty Factors. Section 17(j) of the Act provides that penalties shall be assessed on the basis of four factors:

- The gravity of the violation.
- The size of the business.
- The good faith of the employer.
- The employer's history of previous violations.

F. Gravity of Violation. The gravity of the violation is the primary consideration in determining penalty amounts. It shall be the basis for calculating the basic penalty for both serious and other violations. To determine the gravity of a violation the following two assessments shall be made:

- The severity of the injury or illness which could result from the alleged violation.
- The probability that an injury or illness could occur as a result of the alleged violation.

G. Severity Assessment. The classification of the alleged violations as serious or other-than-serious, in accordance with the instructions in (chapter xx) is based on the severity of the injury or illness that could result from the violation. This classification constitutes the first step in determining the gravity of the violation.

A severity assessment shall be assigned to a hazard to be cited according to the most serious injury or illness which could reasonably be expected to result from an employee's exposure as follows:

1. **High Severity:** Death from injury or illness; injuries involving permanent disability; or chronic, irreversible illnesses.
2. **Medium Severity:** Injuries or temporary, reversible illnesses resulting in hospitalization or a variable but limited period of disability.
3. **Low Severity:** Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment.
4. **Minimal Severity:** Other-than-serious violations. Although such violations reflect conditions which have a direct and immediate relationship to the safety and health of employees, the injury or illness most likely to result would probably not cause death or serious physical harm.

H. Probability Assessment.

1. **Categorization.** Probability shall be categorized either as greater or as lesser probability.
 - a) **Greater probability.** Results when the likelihood that an injury or illness will occur is judged to be relatively high.

- b) Lesser probability. Results when the likelihood that an injury or illness will occur is judged to be relatively low.

2. Probability Factors. The following circumstances shall be considered, as appropriate, when violations likely to result in injury or illness are involved:

- a) Number of workers exposed.
- b) Frequency of exposure or duration of employee overexposure to contaminants.
- c) Employee proximity to the hazardous conditions.
- d) Use of appropriate personal protective equipment (PPE).
- e) Medical surveillance program.
- f) Youth and inexperience of workers, especially those under 18 years old.
- g) Other pertinent working conditions.

3. Final Probability Assessment. All of the factors outlined above shall be considered together in determining a final probability assessment. When strict adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the probability may be adjusted as appropriate based on professional judgment. Such decisions shall be adequately documented in the case file.

The probability that an injury or illness will result from a hazard has no role in determining the classification of a violation but does affect the amount of the penalty to be proposed.

I. Gravity-Based Penalty. The gravity-based penalty (GBP) is an unadjusted penalty and is calculated in accordance with the following procedures:

- 1. The GBP for each violation shall be determined based on an appropriate and balanced professional judgment combining the severity assessment and the final probability assessment.
- 2. For serious violations, the GBP shall be assigned on the basis of the following scale:

Table 5-2: Serious Violations

Severity	Probability	GBP	Gravity
High	Greater	\$5,000	High (\$5,000+)
Medium	Greater	\$3,500	Moderate
Low	Greater	\$2,500	Moderate
High	Lesser	\$2,500	Moderate
Medium	Lesser	\$2,000	Moderate
Low	Lesser	\$1,500	Low

The gravity of a violation is defined by the GBP:

- a) A high gravity violation is one with a GBP of \$5,000 or greater.
 - b) A moderate gravity violation is one with GBP of \$2,000 to \$3,500.
 - c) A low gravity violation is one with a GBP of \$1,500.
3. The highest gravity classification (high severity and greater probability) shall normally be reserved for the most serious violative conditions, such as those situations involving danger of death or extremely serious injury or illness. If the Area Director determines that it is appropriate to achieve the necessary deterrent effect, a GBP of \$7,000 may be proposed. The reasons for this determination shall be documented in the case file.
 4. For other-than-serious safety and health violations, there is no severity assessment.
 5. The Area Director may authorize a penalty between \$1,000 and \$7,000 for an other-than-serious violation when it is determined to be appropriate to achieve the necessary deterrent effect. The reasons for such a determination shall be documented in the case file.

Table 5-3: Other-Than-Serious Violations

<i>Probability</i>	<i>GBP</i>
Greater	\$1,000 - \$7,000
Lesser	\$0

6. A GBP may be assigned in some cases without using the severity and the probability assessment procedures outlined in this section when these procedures cannot appropriately be used.
 7. The Penalty Table (Table 5-11) may be used for determining appropriate adjusted penalties for serious and other-than-serious violations.
- J. Gravity Calculations for Combined or Grouped Violations.** Combined or grouped violations will normally be considered as one violation and shall be assessed one GBP. The following procedures apply to the calculation of penalties for combined and grouped violations:
1. The severity and the probability assessments for combined violations shall be based on the instance with the highest gravity. It is not necessary to complete the penalty calculations for each instance or sub item of a combined or grouped violation if it is clear which instance will have the highest gravity.
 2. For grouped violations, the following special guidelines shall be adhered to:
 - a) **Severity Assessment.** There are two considerations for calculating the severity of grouped violations:

- The severity assigned to the grouped violation shall be no less than the severity of the most serious reasonably predictable injury or illness that could result from the violation of any single item.
- If a more serious injury or illness is reasonably predictable from the grouped items than from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor of the grouped violation.

b) Probability Assessment. There are two considerations for calculating the probability of grouped violations:

- The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness.
- If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment of the grouped violation.

In egregious cases an additional factor of up to the number of violation instances may be applied. Such cases shall be handled in accordance with **OSHA Instruction CPL 02-00-080**, Handling of Cases to be Proposed for Violation-By-Violation Penalties, dated October 21, 1990, or the most current version. Penalties calculated with this additional factor shall not be proposed without the concurrence of the Assistant Secretary. (Reference to chapter xx) K. 1. 2. 3.

K. Penalty Adjustment Factors. The GBP may be reduced by as much as 95-percent depending upon the employer's "size of business," "good faith," and "history of previous violations." Up to 60-percent reduction is permitted for size; up to 25-percent reduction for good faith, and 10-percent for history.

Since these adjustment factors are based on the general character of a business and its safety and health performance, the factors generally shall be calculated only once for each employer. After the classification and probability ratings have been determined for each violation, the adjustment factors shall be applied subject to the limitations indicated in the following paragraphs.

1. Penalties assessed for violations that are classified as high severity and greater probability shall be adjusted only for size and history.
2. Penalties assessed for violations that are classified as repeated shall be adjusted only for size.
3. Penalties assessed for regulatory violations, which are classified as willful, shall be adjusted for size. Penalties assessed for serious violations, which are classified as willful, shall be adjusted for size and history.

NOTE: If one violation is classified as willful, no reduction for good faith can be applied to any of the violations found during the same inspection. The employer cannot be willfully in violation of the Act and at the same time, be acting in good faith.

4. The rate of penalty reduction for size of business, employer's good faith and employer's history of previous violations shall be calculated on the basis of the criteria described in the following paragraphs:

- a) Size. A maximum penalty reduction of 60-percent is permitted for small businesses. "Size of business" shall be measured on the basis of the maximum number of employees of an employer at all workplaces at any one time during the previous 12 months.

When a small business (1-25 employees) has one or more serious violations of high gravity or a number of serious violations of moderate gravity, indicating a lack of concern for employee safety and health, the CSHO may recommend that only a partial reduction in penalty shall be permitted for size of business.

- b) Good Faith. A penalty reduction of up to 25-percent, based on the CSHO's professional judgment, is permitted in recognition of an employer's effort to implement an effective safety and health system in the workplace.

- (1) The 25-percent credit for "good faith" normally requires a written safety and health program. In exceptional cases (see below), the CSHO may recommend the full 25-percent for a smaller employer (1-25 employees) who has implemented an efficient safety and health program, but has not reduced it to writing. Such a program should:

- Provide for appropriate management commitment and employee involvement.
- Provide for worksite analysis for the purpose of hazard identification.
- Provide for hazard prevention and control measures.
- Provide for safety and health training.
- Have deficiencies that are only incidental.

NOTE: One example of a framework for such a program is given in OSHA's voluntary "Safety and Health Program Management Guidelines" (Federal Register, Vol. 54, No. 16, January 26, 1989, pp. 3904-3916, or later revisions as published).

- (2) A reduction of 15-percent shall normally be given if the employer has a documentable and effective safety and health program, but with more than only incidental deficiencies.

- (a) No reduction shall be given to an employer who has no safety and health program or where a willful violation is found.
 - (b) Only these percentages (15% or 25%) may be used to reduce penalties due to the employer's good faith. No intermediate percentages shall be used.
 - (c) Where young workers (i.e., less than 18 years old) are employed, the CSHO's evaluation must consider whether the employer's safety and health program appropriately addresses the particular needs of such workers with regard to the types of work they perform and the hazards to which they are exposed.
- c) **History**. A reduction of 10-percent shall be given to employers who have not been cited by OSHA for any serious, willful, or repeated violations in the past three years.
- d) **Total**. The total reduction will normally be the sum of the reductions for each adjustment factor. Table 5-4 provides an overview of the Penalty Adjustment Factors applicable to serious, other-than-serious, and repeat violations.

Table 5-4: Health & Safety Violations Penalty Adjustment Factors: Serious, Other-Than-Serious, and/or Repeated Violations

Adjustment Factor	Restrictions on	Application	Percent Reduction	Comments
Size	No restrictions	1-25 employees	60%	When a small business (1-25 employees) has one or more serious violations of high gravity or a number of serious violations of moderate gravity, indicating a lack of concern for employee safety and health, the CSHO may recommend that only a partial reduction in penalty shall be permitted for size of business.
		26-100 employees	40%	
		101-250 employees	20%	
		251 or more employees	0%	
Good Faith	Cannot apply Adjustment Factor for: <ul style="list-style-type: none"> • Serious violations classified as high severity and greater probability • Repeat violations • Employer receives a Notification of Failure to Abate • Willful violations (If one violation is classified as willful, no reduction for good faith can be applied to any of the violations found during the same inspection. The employer cannot be willfully in violation of the Act and at the same time, be acting in good faith. See Table 4-6) • Employer being cited for failure to certify abatement 	Employer's Written Safety and Health Program: a. Provides for appropriate management commitment and employee involvement; worksite analysis for the purpose of hazard identification; hazard prevention and control measures; and safety and health training AND b. Has deficiencies that are only incidental	25% ¹	In exceptional cases, the CSHO may recommend the full 25% for a smaller employer (1-25 employees) who has implemented an efficient safety and health program but has not reduced it to writing.
		Documentable and effective safety and health program, but with more than only incidental deficiencies	15%	None
		No safety and health program	0%	None
History	Cannot apply Adjustment Factor if: <ul style="list-style-type: none"> • Employer was cited by OSHA for serious, willful, or repeated violations in past three (3) years • Employer cited for failure to certify abatement • Employer receives a Notification of Failure to Abate 	Reduction permitted for current violation if employer was not cited by OSHA for serious, willful, or repeated violations in past three (3) years.	10%	None

¹ Only these percentages (15% or 25%) may be used to reduce penalties due to the employer's good faith. No intermediate percentages shall be used.

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M. Repeated Violations. Section 17(a) of the Act provides that an employer who repeatedly violates the Act may be assessed a civil penalty of not more than \$70,000 for each violation.

1. **Gravity-Based Penalty Factors.** Each violation shall be classified as serious or other-than-serious. A GBP shall then be calculated for repeated violations based on facts noted during the current inspection. Only the adjustment factor for size, appropriate to the facts at the time of the reinspection, shall be applied.
2. **Penalty Increase Factors.** The amount of the increased penalty to be assessed for a repeated violation shall be determined by the size of the employer.
 - a) **Smaller Employers.** For employers with 250 or fewer employees, the GBP shall be doubled for the first repeated violation and quintupled if the violation has been cited twice before. If the Area Director determines that it is appropriate to achieve the necessary deterrent effect, the GBP may be multiplied by 10.

b) **Larger Employers.** For employers with more than 250 employees, the GBP shall be multiplied by 5 for the first repeated violation and multiplied by 10 for the second repeated violation.

3. **Other-Than-Serious, No Initial Penalty.** For a repeated other-than-serious violation that otherwise would have no initial penalty, a GBP penalty of \$200 shall be assessed for the first repeated violation, \$500 if the violation has been cited twice before, and \$1,000 for a third repetition.

NOTE: This penalty will not have the penalty increase factors applied as discussed under xx

4. **Regulatory Violations.** For repeated instances of regulatory violations, the initial penalty shall be doubled for the first repeated violation and quintupled if the violation has been cited twice before. If the Area Director determines that it is appropriate to achieve the necessary deterrent effect, the initial penalty may be multiplied by 10.

NOTE: (See Chapter xx) for additional guidance on citing repeated violations.

N. **Willful Violations.** Section 17(a) of the Act provides that an employer who willfully violates the Act may be assessed a civil penalty of not more than \$70,000 but not less than \$5,000 for each violation.

1. **Gravity-Based Penalty Factors.** Each willful violation shall be classified as serious or other-than-serious.

a) **Willful Serious Violations.** For willful serious violations, a gravity of high, moderate, or low shall be assigned based on the GBP of the underlying serious violation, as described at xx.

b) **Willful Other-Than-Serious Violations.** For willful other-than-serious violations, the minimum willful penalty of \$5,000 shall be assessed.

c) **Willful Regulatory Violations.** In the case of regulatory violations (see xx, below) that are determined to be willful, the unadjusted initial penalty shall be multiplied by 10. In no event shall the penalty, after adjustment for size, be less than \$5,000.

2. The adjustment factor for size and history shall be applied as shown in 5-6. A 10-percent adjustment factor for history shall be given to employers who have not been cited by OSHA for any serious, willful, or repeated violations in the past 3 years. There shall be no adjustment for good faith.

In no case shall the proposed penalty for a willful violation be less than \$5,000.

Table 5-6: Penalty Adjustment Factors - Willful Violations

<i>Adjustment Factor</i>	<i>Restrictions</i>	<i>Application</i>	<i>Percent Reduction</i>	<i>Comments</i>
Size	None	10 or fewer employees	80%	The proposed penalty for any willful violation shall not be less than \$5,000. The \$5,000 penalty is a statutory minimum and not subject to administrative discretion.
		11-20 employees	60%	
		31-40 employees	50%	
		21-30 employees	40%	
		41-50 employees	30%	
		51-100 employees	20%	
		101-250 employees	10%	
		251 or more employees	0%	
Good Faith	If one violation is classified as willful, no reduction for good faith can be applied to any of the violations found during the same inspection. The employer cannot be willfully in violation of the Act and at the same time, be acting in good faith.			
History	Reduction not permitted: • Where an employer was cited by OSHA for serious, willful, or repeat violations in past three (3) years. • For Regulatory violations classified as willful.	Reduction permitted for current violation if employer was not cited by OSHA for serious, willful, or repeated violations in past three (3) years.	10%	

The proposed penalty shall then be determined from 5-7.

Table 5-7: Penalties to be Proposed for Willful Violations

<i>Total percent reduction for size and/or history</i>	<i>High Gravity</i>	<i>Moderate Gravity</i>	<i>Low Gravity</i>
0%	\$70,000	\$55,000	\$40,000
10%	\$63,000	\$49,500	\$36,000
20%	\$56,000	\$44,000	\$32,000
30%	\$49,000	\$38,500	\$28,000
40%	\$42,000	\$33,000	\$24,000
50%	\$35,000	\$27,500	\$20,000
60%	\$28,000	\$22,000	\$16,000
70%	\$21,000	\$16,500	\$12,000
80%	\$14,000	\$11,000	\$8,000
90%	\$7,000	\$5,500	\$5,000

O. Violations of 29 CFR Parts 1903 and 1904 Regulatory Requirements.

- 1. General.** Except as provided in the Appropriations Act, Section 17 of the Act provides that an employer who violates any of the posting requirements shall be assessed a civil penalty of up to \$7,000 for each violation and may be assessed a like penalty for recordkeeping violations.

This section provides a brief overview of OSHA's citation and penalty policy for some 1903 and 1904 regulations. The following guidance documents should be consulted for an in-depth discussion of these policies:

- OSHA Instruction CPL 02-00-131, Recordkeeping Policies and Procedures Manual (RKM), issued January 1, 2002, and
- OSHA Instruction CPL 02-00-111, Citation Policy for Paperwork and Written Program Requirement Violations, issued November 27, 1995.

Unadjusted penalties for regulatory violations, including posting requirements, shall have the adjustment factors for size and history applied (excluding willful violations, see II.N.1.c), above). 2.

- 2. Posting Requirements under 1903.** Penalties for violation of posting requirements shall be proposed as follows:

a) OSHA Notice (Poster). A citation for failure to post the OSHA Notice is warranted if:

- (1) The pattern of violative conditions for a particular establishment demonstrates a consistent disregard for the employer's responsibilities under the Occupational Safety and Health Act of 1970 (Act); and
- (2) Interviews show that employees are unaware of their rights under the Act; or
- (3) The employer has been previously cited or advised by OSHA of the posting requirement.

If the criteria above are met and the employer has not displayed (posted) the New Jersey Occupational Safety and Health poster as prescribed in N.J.A.C 12:110-3.5(c), that is furnished by the New Jersey Department of Labor and Workforce Development, an other-than-serious citation shall normally be issued. The unadjusted penalty for this alleged violation shall be \$1,000.

- b) Citation Posting.** If an employer received a citation that has not been posted as prescribed in 29 CFR 1903.16, another-than-serious citation shall normally be issued. The unadjusted penalty shall be \$3,000.

3. Injury and Illness Records and Reporting under 1904.

a) General Requirements. Where citations are issued, penalties will be proposed only in the following cases:

- (1) Where OSHA can document that the employer was previously informed of the requirements to keep records; or,
- (2) Where the employer's deliberate decision to deviate from the recordkeeping requirements, or the employer's plain indifference to the requirements, can be documented.

b) OSHA 300 and OSHA 301 Forms. When a penalty is appropriate, there will be an unadjusted penalty of:

- \$1,000 for each year the OSHA 300 was not properly kept
- \$1,000 for each OSHA 301 that was not filled out at all (up to a maximum of \$7,000)
- \$1,000 for each OSHA 301 that was not accurately completed (up to a maximum of \$3,000)

Table 5-8 provides an overview of the penalties for recordkeeping violations.

Table 5-8: Penalty Overview - 29 CFR Part 1904 Recordkeeping Violations

	Are the Records Kept?	Have recordable injuries or illnesses occurred?	Should a citation be issued?	Type of Citation	Unadjusted Penalty ²
OSHA 300 Log and OSHA 301 Incident Report (or equivalent)	No	No, as per employee interviews	No	N/A	None
	No	Yes	Yes	Other than Serious	\$1,000 for each year the OSHA 300 <i>was not kept</i> ³ \$1,000 for each OSHA 301 that was <i>not filled out at all</i> up to a \$7,000 maximum
	Yes, but records contains minor inaccuracies or not properly completed	Yes	Yes, but only in circumstances where defects materially impair the understand-ability of the hazards	Other than Serious	\$1,000 for each OSHA 300 not properly kept \$1,000 for each OSHA 301 not accurately completed up to a \$3,000 maximum

¹ See **CPL 02-00-131**, Recordkeeping Policies and Procedures Manual (RKM), issued January 1, 2002.

² Where citations are issued, penalties will be proposed only where:

- OSHA can document that the employer was previously informed of the requirements to keep records; or
- The employer's deliberate decision to deviate from the recordkeeping requirements, or the employer's plain indifference to the requirements, can be documented.

³ Except for violation-by-violation citations.

Posting Annual Summary Requirements OSHA 300A Form

- (1) An other-than-serious citation will normally be issued if employer:
- Fails to post the OSHA 300A Summary by February as required by 1904.32(a)(1).
 - Fails to certify the Summary as required by 1904.32(b)(3).
 - Fails to keep the Summary posted for three months, until May 1, as required by 1904.32(b)(6).

The unadjusted penalty for this violation will be \$1,000.

- (2) A citation will not be issued if the Summary that is not posted or certified reflects no injuries or illnesses, and no injuries or illnesses actually occurred. The CSHO will verify that there were no recordable injuries or illnesses by interviews, or by review of workers' compensation or other records, including medical records. 5-9 provides an overview of the penalties associated with 1904 posting violations.

Table 5-9: Penalty Overview - 29 CFR Part 1904 Injury And Illness Posting Violations

Employer failed to:	Have recordable injuries or illnesses occurred?	Should a citation be issued?	Type of Citation	Unadjusted Penalty
Post the Annual Summary (OSHA 300A)	No	No	N/A	None
	Yes	Yes	Other than Serious	\$1,000
Certify the Annual Summary (OSHA 300A)	No	No	N/A	None
	Yes	Yes	Other than Serious	\$1,000
Keep the Annual Summary (OSHA 300A) posted for three months	No	No	N/A	None
	Yes	Yes	Other than Serious	\$1,000

See [CPL 02-00-131](#), Recordkeeping Policies and Procedures Manual (RKM), issued January 1, 2002

- c) Reporting.** In accordance with 1904.39, an employer is required to report to OSHA within 8 hours of the time the employer learns of the death of any employee or the inpatient hospitalization of three or more employees, from a work-related incident. This includes fatalities at work caused by work-related heart attacks. There is an exception for certain work-related motor vehicle accidents or public transportation accidents.

- (1) The employer must orally report the fatality or multiple hospitalizations by telephone or in person to the OSHA Area Office (or State Plan office) that is nearest to the site of the incident. OSHA's toll-free telephone number may be used: 1-800-321-OSHA (1-800-321-6742).

- (2) An other-than-serious citation will normally be issued for failure to report such an occurrence. The unadjusted penalty will be \$5,000.
- (3) If the Area Director determines that it is appropriate to achieve the necessary deterrent effect, the unadjusted penalty may be \$7,000.
- (4) If the Area Director becomes aware of an incident required to be reported under 1904.39 through some means other than an employer report, prior to the elapse of the 8-hour reporting period and an inspection of the incident is made, a citation for failure to report will normally not be issued. 5-10 provides an overview of the penalties associated with 1904 posting violations.

1

Table 5-10: Penalty Overview - 29 CFR Part 1904 Reporting And Access Violations

Employer failed to:	Should a citation be issued?	Type of Citation	Unadjusted Penalty
Report to OSHA an employee death or the inpatient hospitalization of three or more employees from a work-related incident	Yes ²	Other than Serious	\$5,000 ³
Provide access to OSHA injury and illness records	Yes ⁴	Other than Serious	\$1,000 ⁵

¹ See **CPL 02-00-131**, Recordkeeping Policies and Procedures Manual (RKM), issued January 1, 2002.

² Unless the Area Director becomes aware of an incident through some other means prior to the elapse of the 8-hour reporting period;'

³ The Area Director may increase the unadjusted penalty to \$7,000 if it is determined appropriate to achieve the necessary deterrent effect

⁴ If the employer is to be cited for failure to keep records no citation for failure to give access will be issued.

⁵ For each form not made available. The unadjusted penalty will be \$1,000 for each OSHA 301 not provided up to a maximum of \$7,000.

(d) Access to Injury and Illness Records for Employees. If the employer fails upon request to provide copies of records required in 1904.29(a) to any employee, former employee, personal representative, or authorized employee representative by the end of the next business day, a citation for violation of 1904.35(b)(2) will normally be issued. The unadjusted penalty will be \$1,000 for each form not made available.

(1) For example: If the OSHA 300 or the OSHA 300A for the current year and the three preceding years is not made available, the unadjusted penalty will be \$4,000.

(2) If the employer does not make available the OSHA 301s, the unadjusted penalty will be \$1,000 for each OSHA 301 not provided, up to a maximum of \$7,000.

When a CSHO determines that there may be significant recordkeeping deficiencies, it may be appropriate to make a referral for a recordkeeping inspection, or to contact the Region's Recordkeeping Coordinator for guidance and assistance. e)

- e) **Willful and Significant Cases.** All willful recordkeeping cases and all significant cases with major recordkeeping violations will be initially reviewed by the Region's Recordkeeping Coordinator.
- f) **Egregious Cases.** When willful violations are apparent, violation-by-violation citations and penalties may be proposed in accordance with OSHA's egregious policy as stated in **OSHA Instruction CPL 02-00-080**, Handling of Cases to be Proposed for Violation-By-Violation Penalties, dated October 21, 1990, or the most current version.

P. Failure to Provide Access to Medical and Exposure Records 29 CFR 1910.1020.

If the employer is cited for failing to provide records as required under 29 CFR 1910.1020 for inspection and copying by any employee, former employee, or authorized representative of employees, an unadjusted penalty of \$1,000 shall be proposed for each record; i.e., either medical record or exposure record, on an individual employee basis. A maximum \$7,000 may be assessed for such violations. This policy does not preclude the use of violation-by-violation penalties where appropriate. (See **OSHA Instruction CPL 02-00-080**, Handling of Cases to be Proposed for Violation-By-Violation Penalties, dated October 21, 1990, or the most current version.)

EXAMPLE: If all the necessary evidence is established where an authorized employee representative requested exposure and medical records for 3 employees and the request was denied by the employer, a citation would be issued for 6 instances of violation of 29 CFR 1910.1020, with an unadjusted penalty of \$6,000.

- Q. **Advanced Notice of Inspection.** When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by 29 CFR 1903.6, an other-than-serious citation shall be issued. The violation shall have an unadjusted penalty of \$2,000.

Table 5-11: Penalty Table

Percent Reduction	Penalty in Dollars							
0	\$1,000	\$1,500	\$2,000	\$2,500	\$3,000	\$3,500	\$5,000	\$7,000
10	\$900	\$1,350	\$1,800	\$2,250	\$2,700	\$3,150	\$4,500	\$6,300
15	\$850	\$1,275	\$1,700	\$2,125	\$2,550	\$2,975	\$4,250*	\$5,950
20	\$800	\$1,200	\$1,600	\$2,000	\$2,400	\$2,800	\$4,000	\$5,600
25	\$750	\$1,125	\$1,500	\$1,875	\$2,250	\$2,625	\$3,750*	\$5,250*
30	\$700	\$1,050	\$1,400	\$1,750	\$2,100	\$2,450	\$3,500	\$7,900
35	\$650	\$975	\$1,300	\$1,625	\$1,950	\$2,275	\$3,250*	\$4,550*
40	\$600	\$900	\$1,200	\$1,500	\$1,800	\$2,100	\$3,000	\$4,200
45	\$550	\$825	\$1,100	\$1,375	\$1,650	\$1,925	\$2,750*	\$3,850*
50	\$500	\$750	\$1,000	\$1,250	\$1,500	\$1,750	\$2,500	\$3,500
55	\$450	\$675	\$900	\$1,125	\$1,350	\$1,575	\$2,250*	\$3,150*
60	\$400	\$600	\$800	\$1,000	\$1,200	\$1,400	\$2,000	\$2,800
65	\$350	\$525	\$700	\$875	\$1,050	\$14,225	\$1,750*	\$2,450*
70	\$300	\$450	\$600	\$750	\$900	\$1,050	\$1,500	\$2,100
75	\$250	\$375	\$500	\$625	\$750	\$875	\$1,250*	\$1,750*
85	\$150	\$225	\$300	\$375	\$450	\$525	\$750*	\$1,050*
95	\$100**	\$100**	\$100	\$125	\$150	\$175	\$250*	\$350*

*Starred figures represent penalty amounts that would not normally be proposed for high gravity serious violations because no adjustment for good faith is made in such cases. They may occasionally be applicable for other-than-serious violations where the Area Director has determined a high unadjusted penalty amount to be warranted.

**Administratively, OSHA will not issue a penalty less than \$100 for a serious violation.

Directives Referenced in Chapter 5 – Penalties

Directive Number	Page
OSHA Instruction 02-00-051 , Enforcement Exemptions and Limitations under the Appropriations Act initially issued on May 28, 1998 with a memo change dated January 23, 2004.....	2
OSHA Instruction CPL 02-00-080 , Handling of Cases to be Proposed for Violation-By-Violation Penalties, dated October 21, 1990, or the most current version.....	1, 8, 15, 22, 26, 27
OSHA Instruction CPL 02-00-111 , Citation Policy for Paperwork and Written Program Requirement Violations, issued November 27, 1995.....	2, 20
OSHA Instruction CPL 02-00-131 , Recordkeeping Policies and Procedures Manual (RKM), issued January 1, 2002.....	19, 22, 24, 25

PUBLIC EMPLOYEES' OCCUPATIONAL SAFETY and HEALTH (PEOSH)

FIELD INSPECTION REFERENCE MANUAL (FIRM)

INDEX

Abatement

Assistance.	II-16
Effect of Contest	IV-1
Good Faith Effort	IV-16
Long Term	IV-2
Partial	IV-16
Period.	IV-1
Plan, of Employer	IV-3
PMA (see Petition to Modify Abatement Date)	
Reporting (by CSHO)	II-20
Verification of	IV-1

Abatement Date

Employee Contest of	II-19
Final	IV-3
Long-Term	IV-2
Reasonable	IV-1
Absorption Hazards	III-25

Access to

Classified Areas.	II-13
Records	IV-21
Accidents (see also Fatality/Catastrophe under Inspections).	I-10, III-6, 7, 9
Additive/Synergistic Effects	III-25
Adjustment Factors (penalty)	IV-12
Good Faith.	IV-8, 12 to 14, 16, 18, 23
History (see also Geographical Limitations)	IV-8, 12 to 14, 18, 19
Size.	IV-8, 12 to 14, 15, 17 to 19
Administrative	
Controls (see also Feasible).	IV-3
Subpoena.	I-12, II-3, 7
Advance Notice	I-11, II-15, IV-22, 24
Affected Employee (see Employee)	
Affirmative Defenses	III-29 to 31
Greater Hazard.	III-31
Impossibility	III-30
Multiemployer Worksites	III-31
Unpreventable Employee Misconduct (Isolated Event).	III-30
Agreements (see Settlements)	
Alleged Violation Description (AVD).	III-19
Alternative Standards.	III-26
Amending/Withdrawing Citations (see also Informal	

Conference and Settlements). IV-5 to 7, 26, 30

Annual Summary (see Form OPEOSH-200)

Apparent Violation II-14

Appropriations Act (see also CPL 2.51H or most current
version). I-4, II-10, IV-8

Chief

Decisions (at Informal Conferences) IV-24 to 26

Responsibilities. I-1, IV-1, 3 to 5

Settlements (ISAs). IV-26 to 28

Area Office

Construction Inspections Beyond Single (Area Office). II-25

Position on PMAs. IV-27

Responsibilities. I-2

Assessment

Probability IV-9, 10, 12

Severity. IV-9, 12

Assistance

Employer Abatement. II-16

Expert. I-12

Assistant Chief (Responsibilities) I-1

Authorization (Advance Notice) I-11

Authorized Representative (see Employee, Employer,
and Representative)

AVD (Alleged Violation Description). III-19

Bankrupt/Out of BusinessII-8

Biological Monitoring.III-25

Burden of Proof (Affirmative Defenses)III-29

Case File Activity Diary III-4

Case File StagesIII-1 to 3

Catastrophe (see also CPL 2.77).I-4, II-5, 20, III-6

Certification

Employer (ISAs) IV-32

Form (Review Commission). IV-35, 36

Informal Settlement Agreement IV-32

Summary (OPEOSH 200 Form) IV-20

Certified

Bargaining Agent.II-9, 11, 12

Mail. I-7, IV-4, 30

Citation

5(a)(1) (see General Duty)

Amending. IV-5 to 7, 26, 30

IssuingIV-4

MailingIV-4

Policy (Ventilation Standard)III-20

Pre-Citation Consultation (with Solicitor). III-1

Violation Types (see Violations)

Withdrawing IV-5 to 7, 26, 30

WritingIII-25

Classified

Areas	II-13
Information/Trade Secrets	I-12, II-12, 17, III-4
Clearance (see Security Clearance)	
Closing Conference	II-18, 26
Collecting Samples	II-14
Combining Violations	III-26, IV-10 to 12
Communication with Review Commission	IV-37
Complainant	
Discrimination.	I-9
Employee, Right of.	II-15
Identity.	I-6
Letters to.	I-5, 6, 8, 9
Complaints	
Compulsory Process (Warrants)	II-6
Definitions	I-6
Employee, Right of.	II-15
Formal.	I-6, 7
Imminent Danger Alleged	I-6, 7
Inspections/Investigations.	I-5
Letters	I-5, 6, 8, 9
Nonemployee (see Nonformal)	
Nonformal	I-6, 8
Oral.	I-6
Priority.	I-3
Referrals	I-10, II-5

Response.	I-7 to 9
Section 11c Nonformal	I-9
Telephone	I-8 to 10
Workplace	II-25
Compliance Safety and Health Officer (CSHO)	
Dealing with Parties before the Commission.	IV-37
Disposition of Inspection Records	I-2
Personal Security Clearance	I-12
Presenting Credentials.	II-1
Release of Inspection Information	I-2
Responsibilities.	I-1
Selection of.	II-21
Subpoena Served on.	I-2
Testifying.	I-2
Visitor's Register.	II-8
Comprehensive (see Inspections/Investigations)	
Compulsory Process (see Warrants)	
Conference	
Closing	II-18, 26
Informal.	IV-24
Opening	II-10
Construction	
Definition.	II-25
Inspections	II-25
Standard Applicability.	II-25

Worksite. II-25

Consultation (see also TED 3.5)

Pre-Citation (with Solicitor) III-1

Voluntary Compliance Programs II-10

Voluntary Protection Programs II-11

Contest

Effect Upon Abatement Period. IV-1

Effect Upon Inspection Selection Criteria I-5

Employee. II-19

Notice Transmittal to Review Commission IV-33

Controlling Employer (see Multiemployer Worksites)

Controls (Administrative and Engineering). IV-2

Corporate-Wide Settlements (see also CPL 2.90) IV-32

Correcting Employer (see Multiemployer Worksite)

Creating Employer (see Multiemployer Worksite)

Credentials, Presentation of II-1

Criminal II-18, 21, 22, IV-24

Criminal/Willful Violations. III-15 to 17, IV-24

Dates

Abatement IV-1 to 3

Final, of Settlements and Review Commission Orders. . IV-32

PMA Filing. IV-26

Death (see Fatality)

Decisions

Administrative Law Judge (ALJ). IV-33

Court	IV-33
Informal Conference	IV-24, 26
Definitions	
Affirmative Defenses.III-29
Catastrophe	II-21
CombiningIII-26
Complaint	I-6
Construction Work	II-25
Employee.	III-5
Fatality.	II-20
Formal Complaint.	I-5
Grouping.III-26
Hazard.	III-9
Horizontal & Vertical Standards	III-4
Hospitalization	II-21
Imminent Danger	II-22
Nonformal Complaint	I-8
Referrals	I-5
Reporting Fatalities/Catastrophes	II-21
Representative of Employee.II-9, 11, 12
Universal & Specific Industry Standards	III-4
Walk-around Representatives.	II-11
Worksite.	II-25
Delay in Issuing Citation (see Issuing under Citation)	
De Minimis Violations.I-7, 8, III-19

Denial of Entry. II-2, 8

Diary (Inspection Case File Activity). III-4

Disclaimers (Employers Abatement Assistance) II-17

Disclosure of Records.I-13

Discrimination, OSH Act 11© (see also
DIS .4B). I-6, 8 to 10, II-19

Disposition of Inspection Records. I-2

Disruptive Conduct II-12

Documentation

Advance Notice.I-12

Elements of Serious Violation III-7

Four Stage Case File. III-1

Informal Conference IV-25, 26

Proximity to Hazard III-5

Recognized HazardIII-10

Willful Fatality (Criminal Referral).III-16, 17

Egregious (Violation-by-Violation) III-28, IV-12, 16, 29

Elimination of Imminent Danger II-23, 24

Emphasis Programs (Local). I-4, 10

Employee

Complaints. II-15

Contest II-19

Definition. III-5

Exposure. II-14, 20, III-5, IV-4, 9

Interviews. II-15

Misconduct (Isolated Event Defense)	III-30
Objection to PMA.	IV-28
Other Employer, of.	II-10
Participation	II-9
Representative.	II-11, 12, 18, 19
Responsibilities.	III-29
Right of Complaint.	II-15
Rights (see also Walk-around).	II-15, 18

Employer

Abatement Assistance.	II-16
Abatement Plan.	IV-3
Advance Notice.	I-11
Affirmative Defenses.	III-29 to 31
Bankrupt/Out of Business.	II-8
Certify (ISAs).	IV-32
Contacts.	I-5
Controlling (see Multiemployer Worksite)	
Correcting (see Multiemployer Worksite)	
Creating (see Multiemployer Worksite)	
Exposing (see Multiemployer Worksite)	
Good Faith.	IV-8, 12 to 14, 16, 18, 23
History (see also Geographical	
Limitations)	IV-8, 12 to 14, 18, 19
Immediately Corrects.	IV-15
Interference.	II-2, 8

Larger. IV-17
 Multifacility III-18
 Notification Requirement. IV-22
 Posting Requirements. . . . II-13, 14, IV-8, 19, 21, 27, 28
 Recognition of Hazard III-10
 Refusal of Entry. II-2, 8
 Reporting (employment accidents). IV-21
 Representatives II-11
 Responsibilities. III-4, 15, 28, 29
 Safety and Health Program II-14
 Services Available. IV-28
 Size. IV-8, 12 to 14, 15, 17 to 19
 Small IV-14, 17
 Worksite. II-25
 Engineering Controls IV-2, 3

Entry

Refusal of. II-2, 8
 Workplace, of the II-25
 Expert Assistance. I-12
 Exposing Employer (see Multiemployer)
 Exposure II-14, 20, III-5, IV-4, 9
 Observed. III-6
 Potential III-6
 Reducing. IV-4
 Unobserved. III-6

Failure to Abate (see Penalty)

Family, Victims. II-21

Fatality/Catastrophe (see also CPL 2.77) . I-4, II-5, 20, III-6

Feasible

Administrative.IV-3

Controls. IV-2, 3

Economic.IV-4

Engineering Controls. IV-2, 3

Method of Correction.III-11

TechnicalIV-3

Work Practices.IV-3

Federal Agency Inspections/Programs (or contract
with) II-2, 4, 12, 25, 26

Federal Marshal AssistanceII-7

Final Order Dates. IV-32

Fire/Explosion-Related Ventilation Standard.III-21

FOIA (Freedom of Information Act).I-13

Follow-up I-4, II-6, 19, 20, IV-5

Formal

Complaints.I-6, 7

Settlements IV-32

Forms/Pamphlets

OSHA-1 (Inspection Report). II-10, III-1, 2, IV-3

OSHA-1A (Narrative)III-2, 3

OSHA-1B or 1BIH (Worksheets).II-15, 20, III-2, 3, 4, 14, 19

OSHA-2 (Citation & Notification of Penalty)	III-27, IV-6, 36
OSHA-2B (Notification of Failure to Abate Alleged Violations).	IV-5, 6, 15, 36
OSHA-7 (Notice of Alleged Safety or Health Hazards)	I-6, 9, 10
OSHA-8 (Notice of Alleged Imminent Danger).	II-23, 24
OSHA-36F (Fatality/Catastrophe Report).	II-5
OSHA-89 (Photo Mounting Worksheet).	III-4
OSHA-90 (Referral Report)	I-6
OSHA-101/101S (Supplementary Record of Occupational Injuries & Illnesses)	IV-20
OSHA-300 (Log & Summary of Occupational Injuries & Illnesses).	III-27, IV-19 to 21
Four Stage Case File	III-1 to 3
Freedom of Information Act (FOIA).	I-13
General Duty	III-8
Elements.	III-8
Evaluation of Section 5(a)(1) Situations.	III-8
Formalizing Oral Complaints	I-6
Limitations	III-12
Pre-Citation Review	III-13
Requirements.	III-8
Violation of.	III-8
When Not to Group	III-27
Geographical Limitations	III-18

Good Faith	IV-8, 12 to 14, 16, 18, 23
Gravity (see also Penalty and Violations)	III-18, IV-8 to 11, 16 to 18
Gravity-Based Penalty (GBP).	IV-12, 16 to 18
Greater Hazard Defense	III-31
Grouping Violations.	III-26, 27, IV-11, 12, 21
Hazard	
Affect the Cited Employer's Employees	III-10
Common Sense Recognition.	III-11
Corrected by a Feasible/Useful Method	III-11
Definition.	III-9
Employer Recognition.	III-10
Employee Exposure to.	III-8
General Duty.	III-8
Greater	III-31
Industry Recognition.	III-11
Likely to Cause Death/Serious Physical Harm	III-11
Not a Particular Accident	III-9
Proximity to.	III-5
Reasonably Foreseeable.	III-10
Recognized.	III-10
Health Violations.	III-20 to 25
Hearings, CSHO Testifying at	I-2
High Gravity Violations.	III-18
History (see also Geographical	

Limitations).IV-8, 12 to 14, 18, 19

Horizontal Standards III-4

Hospitalization. II-21

Identity of Complainant. I-6

Imminent Danger. I-4, 7, 8, II-5, 22, 23

Implementation of Feasible Engineering Controls.IV-2

Impossibility Defense.III-30

Informal

Complaints (see Nonformal Complaints)

Conference. IV-24

Settlements (see also ADM 1-1.13A, Chapter
VIII). IV-28 to 32

Information

Public Information Policy II-22

Release of Inspection Information I-2

Trade Secret.I-13

Ingestion HazardIII-25

Inspection

Case File Diary III-4

History (of Employer) (see also Geographical
Limitations)IV-8, 12 to 14, 18, 19

Records, Disposition of I-2

Scheduling. I-3

Warrants (Compulsory Process)II-3

Inspections/Investigations

Accidents I-10, III-6, 7, 9

Advance Notice. I-11, II-15, IV-22, 24

Catastrophe (see also CPL 2.77) I-4, II-5, 20, III-6

Complaint I-3 to 5, II-5

Comprehensive (Wall-to-Wall). II-1

Conduct of. II-1

Construction. II-25

Criminal. II-22

Fatality (see also CPL 2.77). I-4, II-5, 20, III-6

Federal Agency (or contract with) II-2, 4, 12, 25, 26

Follow-up. I-4, II-6, 19, 20, IV-5

Imminent Danger I-4, 7, 8, II-5, 22 to 24

Interference. II-2, 8

Local Emphasis. I-4, 10

Military Base II-2

Monitoring. II-6, 19

Partial II-1

Planning (see also Scheduling). I-3, 10

Preparation I-10

Presenting Credentials. II-1

Priorities. I-4

Procedures. II

Programmed. I-3, 10, II-6, 9

Referrals (see also Referrals). I-3, 4, 6, 10, II-5

Refusal of Entry. II-2, 8

Release of Information.	I-2
Scope	II-1, 5, 10, 23
Selection Criteria.	I-4
Special Procedures.	II-19
Time of	II-1
Types (see also specific types)	I-3
Unprogrammed.	I-3, 5, II-9
Use of Resources.	I-4, 5
Walk-around.	II-14
Interaction with Other Agencies (Rescue Operations).	II-22
Interference	II-2, 8
Interviews	II-15
Employees	II-15
Privacy	II-15
Statements.	II-16
Time/Location	II-15
Investigations (see Inspections/Investigations)	
Isolated Event Defense	III-30
Issuing Citations (see also Citation).	IV-4
Jurisdiction, Federal Agency (see also Preemption)	II-12, 25
Labor Dispute/Strike	II-9
LEP (Local Emphasis Programs) (see also CPL 2.102)	I-4, 10
Lesser Gravity Violations.	III-18

Letters

Complainant	I-5, 6, 8, 9
-----------------------	--------------

Certified Mail. I-7, IV-4, 30

Employers I-8

Nonformal Complaints. I-8

ReferralsI-10

Withdrawing Citation.IV-7

Limitations

Geographical.III-18

Time (Repeated Violations).III-17

Local Emphasis Programs (LEP) (see also CPL 2.102) I-4, 10

Longshoring.III-18

Lost Workday Injury Rate (LWDI). II-13

LWDI (Lost Workday Injury Rate). II-13

Mailing Certified. I-7, IV-4, 30

Military Base.II-2

Miranda Warnings (see Criminal/Willful Violations) . . .III-16

Modification of Abatement Dates (PMA). IV-26, 36

Monitoring InspectionsII-6, 19

Multiemployer

Inspection Types (Unprogrammed NOTE). I-3

Refusal of Entry.II-2

WorksitesII-2, 10, III-28, 31

Multifacility EmployerIII-18

Noise StandardIII-21

Nonformal ComplaintsI-6, 8

Notice of

Contest Transmittal to OSH Review Commission.	IV-33
Failure to Abate (see Penalty, Failure to Abate)	
Notification Requirements (Advance Notice)	IV-22
Objections to PMA.	IV-28
Observed Exposure.	III-6
Opening Conference	II-10
OPEOSH Notice (Poster)	IV-19

Other Agencies

Entry of Workplace.	II-25
Interaction with (Rescue Operations).	II-22
Other-Than-Serious Violations.	III-6, 27, IV-11
Out of Business/Bankrupt	II-8
Outreach Program (Area Office Responsibilities).	I-2

Penalty

Additional (Failure to Abate)	IV-15
Adjustment Factors.	IV-12
Good Faith	IV-8, 12 to 14, 16, 18, 23
History (see also Geographical Limitations).	IV-8, 12 to 14, 18, 19
Size	IV-8, 12 to 14, 15, 17 to 19
Civil	IV-7
Criminal.	II-22, IV-24
Factors	IV-8
Failure to Abate.	II-20, III-19, IV-15, 16, 26, 35

General Policy.	IV-7
Gravity	III-18, IV-8 to 11, 16 to 18
Gravity-Based Penalty (GBP)	IV-12, 16 to 18
Grouped Violations.	III-26, 27, IV-11, 12, 21
Immediate Correction.	IV-15
Increase Factors.	IV-17
Minimum	IV-8
No Initial.	IV-17
Policy.	IV-7
Posting	IV-8
Probability Assessment.	IV-9, 12
Severity Assessment	IV-9, 11
Statutory Authority	IV-7
Table	IV-23
Petition to Modify Abatement Date (PMA).	IV-26, 36
Photographs (see also Videotapes and CPL 2.98)	II-15, 18

Planning

Inspection Preparation.	I-9
Program	I-2
PMA (Petition to Modify Abatement Date).	IV-26, 36

Policy

Advance Notice.	I-10
Employer Abatement Assistance	II-15
Penalty	IV-7
Public Information.	II-21

Trade Secrets	II-16
Post-Contest Settlements (see Formal Settlement Agreements) Posting	
Amended/Withdrawal Citation	IV-4, 5, 22
Annual Illness/Injury Log (OPEOSH-200).	IV-16, 18
Informal Conference Form.	IV-20
Notice of Alleged Imminent Danger (OPEOSH-8).	II-24
Penalty	IV-8
Petition to Modify Abatement Date (PMA)	IV-27, 28
Requirements.	II-13, 14, IV-8, 19, 21, 27, 28
Violations.	IV-8, 19
Postmark (Notice of Contest)	IV-34
Potential Exposure	III-6
Pre-Citation	
Consultation (with Solicitor)	III-1
Review (General Duty Violations).	III-13
Pre-Contest Settlements (see Informal Settlements)	
Preemption	II-12, III-11
Preinspection Compulsory Process (Warrants).	I-12
Preparation (Inspection)	I-10
Presenting Credentials	II-1
Priorities (Inspection).	I-4
Privacy, Interview	II-15
Probability Assessment	IV-9, 10, 12

Procedures

Amending Citations.	IV-6
Informal Conference	IV-24
Informal Settlements (see also Settlements and ADM 1-1.13A, Chapter VIII).	IV-32
Pre-Citation Consultation (with Solicitor).	III-1
Withdrawing Citation.	IV-6

Process

Compulsory.	II-3
Preinspection Compulsory.	I-12, II-3, 6
Program Planning	I-2
Programmed Inspections	I-3, 10, II-6, 9
Proximity to Hazard.	III-5
Public Information Policy.	II-22
Recognition of Hazard.	III-10

Recordkeeping

Penalty	IV-19
Requirements.	IV-20
Violation	IV-19

Records

Access.	IV-21
Disclosure of	I-13
Disposition of.	I-2
Examination of.	II-13
Exposure.	II-7, 22

Posting	II-14
Referrals (see also Inspections/Investigations)	
Complaints.	I-10, II-5
Definition.	I-6
Priority.	I-4
Refusal of Entry	II-2, 8
Assistant Director (Responsibilities).	I-1, II-3, 7, IV-27
Regulatory Violation	IV-17, 19
Release for Entry.	II-8
Release of Inspection Information.	I-2
Repeated Violations.	III-17 to 19, IV-16
Repeated vs. Failure to Abate.	III-19
Repeated vs. Willful	III-19

Reporting

Abatement	II-20
Fatality/Catastrophe.	II-21, IV-21
Imminent Danger Notice.	I-7
Requirements.	IV-20

Representatives

Authorized.	II-11, 12
Employee.	II-11, 12, 18, 19
Employer.	II-11
Safety Committee.	II-12
Walk-around.	II-11

Requirements

Failure to Meet (PMAs).	IV-27
Imminent Danger Investigations.	II-23
Notification.	IV-22
Posting	IV-7, 18, 19
Recordkeeping	IV-20
Reporting	IV-20
Rescue Operations.	II-22
Resources, Use of.	I-4, 5
Respirator Standard.	III-23
Retention of Inspection Records (see Disposition)	
Review Commission.	IV-33 to 38

Rights

Employee.	II-15, 19
Employer.	II-18
Entry of Workplace.	II-25
Walk-around (see Walk-around)	
Safety Committee	II-12
Safety and Health Programs, Evaluation of.	II-14
Samples, Collecting.	II-14
Scheduling	I-3 to 5

Scope

Inspection.	II-1, 5, 10, 23
Opening Conference.	II-10
Unprogrammed Inspections.	I-5

Warrants.	II-3
Section 4(b)(1) (Preemption)	II-12, III-11
Section 5(a)(1) (see General Duty)	
Section 7©(1) (Contract Consultation).	II-11
Section 8(f)(1) (Complaints)	I-6, 7
Section 11© Complaint.	I-6 to 10, II-19, 24
Section 17 Designation (Unclassified Violation).	IV-29
Security Clearance	I-13

Selection

Criteria, for Inspections	I-4
CSHO, of.	II-21
Serious Violations	III-6, 17, IV-15
Services Available to Employer	IV-28

Settlements

Chief, by	IV-24
Corporate-Wide (see CPL 2.90)	IV-32
Final Dates	IV-32
Formal Settlements (Post-Contest)	IV-32
Informal Settlements (Pre-Contest) (see also ADM 1-1.13A, Chapter VIII).	IV-28 to 32
Severity Assessment.	IV-9, 12

Sign

Interview Statements.	II-16
Settlement Agreements	IV-30, 31
Size (Factor in Penalty Calculation)IV-8, 12 to 14, 15, 17 to 19	

Solicitor

Clearance with.	IV-37
Compulsory Process.	II-3
Coordination.	III-1
Transmittal of File to.	IV-37

Special

Industry (Vertical) Standards	III-4
Inspection Procedures	II-19

Standards

Alternative	III-26
Applicability to Construction Inspections	II-25
Different	III-17
Employer Responsibility to Comply	III-4
Horizontal & Vertical	III-4
Identical	III-17
Respirator.	III-23
"Should".	III-13
Universal & Specific Industry	III-4

Statements

Interview	II-16
Signing	II-16
Transcription	II-16
Strike/Labor Dispute	II-9
Subpoena	IV-37
Administrative.	I-12, II-3, 7

CSHO, served on	I-2
Synergistic/Additive Effects	III-25
Table (Penalty).	IV-23

Telephone

Closing Conference.	II-18, 19
Discrimination Complaints	I-9
Nonformal Complaints.	I-8
Notifying Solicitor (Subpoena).	IV-37
Petition to Modify Abatement Date (PMA)	IV-27
Referrals	I-10
Verification of Abatement	IV-1
Testifying (CSHO).	I-2

Time

Inspection of	II-1
Interview, of	II-15
Limitations (Repeated Violations)	III-17
Reasonable (ISAs)	IV-31
Trade Secrets/Classified Information	I-12, II-12, 17, III-4

Types

Inspections/Investigations.	I-3
Violations.	III-6
Unclassified Violations (Section 17 Designation)	IV-29
Universal (Horizontal) Standards	III-4
Unobserved Exposure.	III-6
Unpreventable Employee Misconduct (Isolated Event Defense)	III-30

Unprogrammed InspectionsI-3, 5, II-9

Use of ResourcesI-4, 5

Variances, Violations of III-5

Ventilation StandardIII-20, 21

Verification of Abatement.IV-1

Vertical Standards III-4

Victims, Family of II-21

Videotapes (see also Photographs and CPL 2.98) . . II-15, 18

Violation-by-Violation (Egregious) III-28, IV-12, 16, 29

Violations III-4

 Apparent. II-14

 Basis of. III-4

 Combining III-26, IV-10 to 12

 Criminal/Willful. III-15 to 17, IV-24

 De Minimis.I-7, 8, III-19

 Egregious (Violation-by-Violation). . III-28, IV-12, 16, 29

 Failure to Abate (see Penalty)

 General Duty Clause III-8

 GravityIV-8 to 11, 16 to 18

 Grouping. III-26, 27, IV-11, 12, 21

 Health.III-20 to 25

 Intentional and Knowing (see Willful)III-13

 Other Laws. II-18

 Other-Than-Serious.III-6, 27, IV-11

 PostingIV-7, 19

Recordkeeping	IV-19
Regulatory.	IV-17, 19
Repeated.	III-17 to 19, IV-16
Section 17 Designation.	IV-29
Serious	III-6, 17, IV-15
Types	III-6
Variances	III-5
Unclassified (Section 17 Designation)	IV-29
Willful	III-13 to 15, 18, IV-17
Voluntary Elimination of Imminent Danger	II-23
Voluntary Compliance Programs.	II-10
Voluntary Protection Programs (VPP).	II-11
VPP (Voluntary Protection Program)	II-11
Walk-around	
Inspection.	II-14
Representatives	II-11
Warrants (Compulsory Process).	I-12, II-3, 6
When Not to Group.	III-27
Willful Violations	III-13 to 15, 18, IV-17
Withdrawal of Citation	IV-5 to 7, 26, 30
Work Practices (see also Feasible)	IV-3
Work-Related Incident.	II-20, 21
Worksite	
Construction.	II-25
Entry	II-25

Multi-employerII-2, 10, III-28, 31

Writing

CitationsIII-25